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IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1972

No. _____

LORENE THOMPSON, Petitioner,

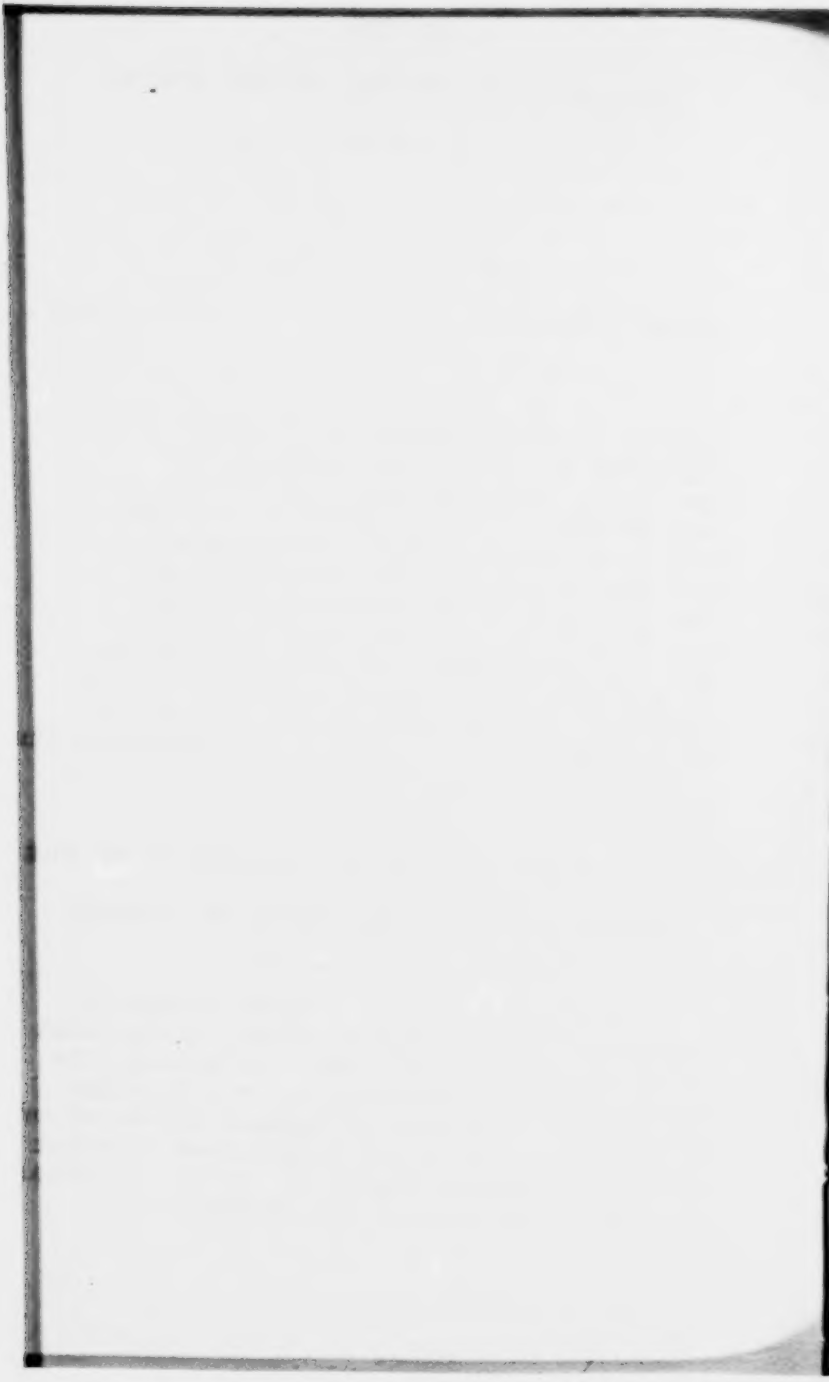
v.

GEORGE C. AMIS, HENRY J. RIOJAS, THEODORE K. SHARP, as members of the Civil Service Board of Kansas; and GEORGE C. AMIS, HENRY J. RIOJAS, and THEODORE K. SHARP, individually; and WALTER F. KUIKEN, Secretary of the Civil Service Board of Kansas; and WALTER F. KUIKEN, individually; and the DEPARTMENT OF ADMINISTRATION of the State of Kansas; and the STATE BOARD OF SOCIAL WELFARE of the State of Kansas, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF KANSAS

The petitioner, Lorene Thompson, appellee in the Court below, prays that a writ of certiorari issue to review the opinions and judgments of the Supreme Court of the State of Kansas rendered on January 22, 1972, and reaffirmed without further opinion (March 8, 1972) by order of denial on Motion for Rehearing.



OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas is reported at 208 Kan. 658, 493 P.2d 1259 and is set out in Appendix A, infra.

A timely Motion for Rehearing was filed which was denied on March 8, 1972, this order being set out in Appendix B, infra.

The mandate contained in the opinion is under an Order Staying its issuance pending disposition of this Petition for Writ of Certiorari, set out in Appendix C, infra.

The opinions and judgment of the District Court of Shawnee County, Kansas, are set out as Appendices D, E, F, and G, infra.

The decisions (no opinion or findings of fact given) of the Civil Service Board of the State of Kansas are set out at Appendices H and I, infra.

JURISDICTION

The opinion, judgment and decree of the Supreme Court of the State of Kansas, reversing the District Court of Shawnee County, Kansas was entered on January 22, 1972. (Appendix A)

Petitioner filed a timely Motion for Rehearing which was denied by Order dated March 8, 1972. (Appendix B)

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

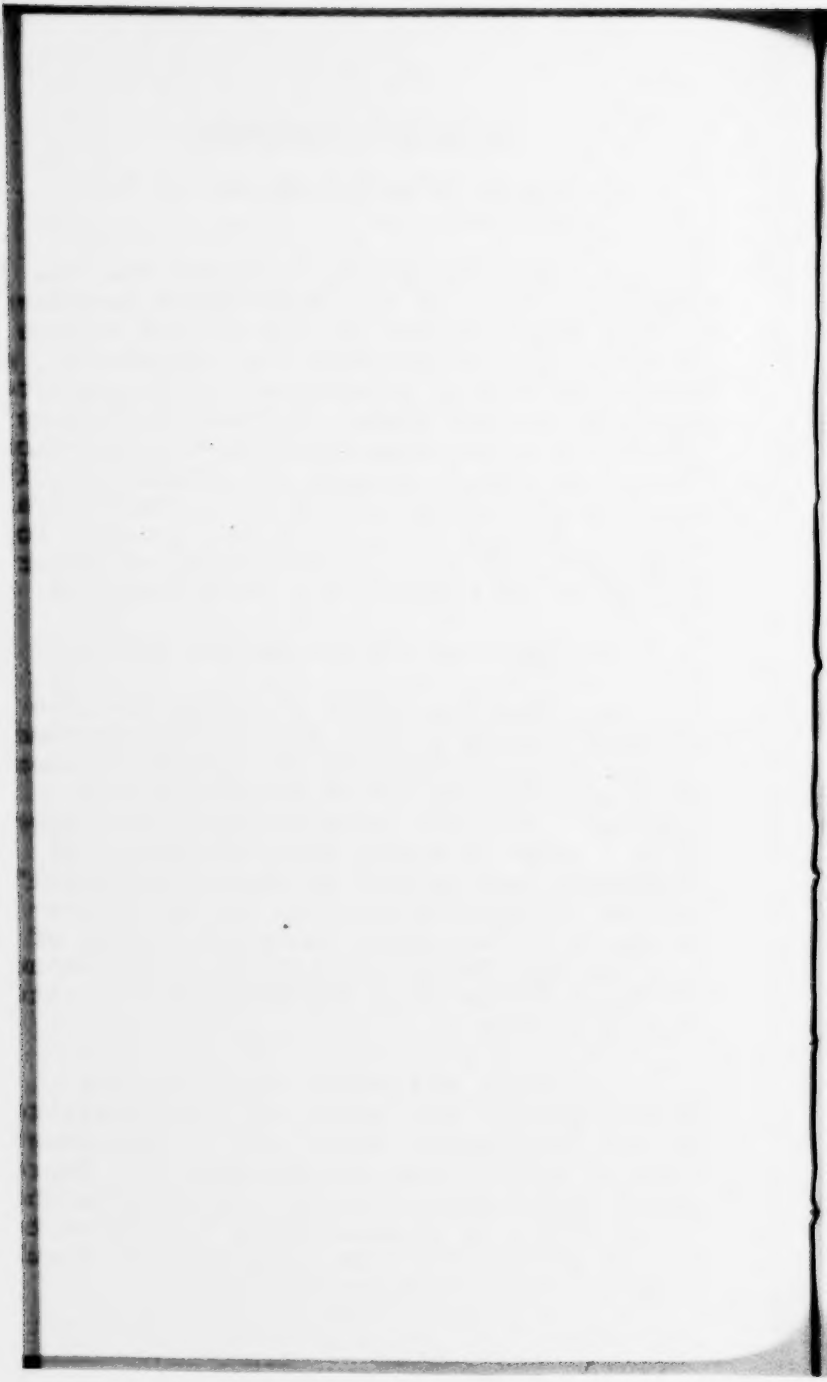
A. ADMINISTRATIVE DENIAL OF DUE PROCESS:

I. Has the State violated the due process clause of the Fourteenth Amendment to the Constitution of the United States by summarily dismissing the Petitioner, a permanent status classified civil service employee of the State, without following the State's own administrative regulation governing the dismissal of classified civil service employees; and also without advance written notice specifying the grounds for dismissal and without affording an opportunity to be heard prior to dismissal?

B. JUDICIAL DENIAL OF DUE PROCESS

I. Has the State violated the due process clause of the Fourteenth Amendment to the Constitution of the United States when its Supreme Court construes and applies a statute permitting direct appellate review in state district court of judgments and orders of "quasi-judicial" bodies (K.S.A. 60-2101(a) so as to preclude an independent judicial review of the law and facts bearing upon the issue of deprivation of a substantial Constitutional right?

II. Has the State deprived the Petitioner of due process of law required by the Fourteenth Amendment to the Constitution of the United States when its Supreme Court, upon appellate review divests the trial court of equitable jurisdiction to decree relief for the violation of a substantial Constitutional right:



1. By establishing a new, "exclusive remedy" rule and applying the same retroactively so as to deprive the Petitioner of any judicial remedy to correct the unconstitutional acts of State administrative bodies;

2. By applying such "exclusive remedy" rule on its own motion in total contradiction to the clear, committed and unappealed position of the State acting in all its capacities prior to pendency of the matter before the State Supreme Court?

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

A. THE DISMISSAL

The Petitioner, Lorene Thompson, a permanent status classified civil service employee of the State of Kansas was summarily dismissed by the acting director of Vocational Rehabilitation of the State of Kansas on February 17, 1969. The dismissal was made without following the Kansas Department of Administration Regulation governing the dismissal of classified civil service employees (Appendix p. 40a) and also without advance notice specifying the grounds for dismissal and without affording an opportunity to be heard prior to dismissal. (Appendix pages 51a, 52a)

B. THE CIVIL SERVICE BOARD PROCEEDINGS

The Petitioner immediately appealed her dismissal to the Civil Service Board which conducted hearings on March 27, 1969, and on April 3, 1969. On April 3, 1969, the Civil Service Board announced its decision as follows:

> "The hearing for E. Lorene Thompson, Vocational Rehabilitation Supervisor, Department of Social Welfare, was resumed at 10:30 A.M. At the conclusion of the hearing, it was the decision of the Board that the action of the appointing authority in dismissing Miss Thompson be sustained. The Personnel Director was directed to place the name of Miss Thompson on the eligible register for Vocational Rehabilitation Counselor for a period of one year." (Appendix p. 29a, 30a)

Other than this decision there was never any written decision, opinion or recommendation made or filed by the Civil Service Board with respect to Petitioner's dismissal. (R. 55)

Following the hearing the Petitioner, relied upon the Civil Service Board decision and representations of the defendants in believing that she could be rehired by the agency as a counselor within a reasonable length of time. Petitioner was advised by her counsel that it would be possible for her to first attempt to obtain re-employment at the Counselor level without waiving the right of

judicial review of the entire ruling of the Board at a later date if it became necessary. (R. 38, 34)

Petitioner elected to forbear for the moment the filing of a Court action in order to first attempt to re-enter her profession in the State by acceptance of a lesser position. During the ensuing year, Petitioner expended her time and efforts in an attempt to be re-employed by the State or in some position bearing some relationship to her training, experience and expertise. At the expiration of the year Petitioner requested that her term of eligibility be extended for a period of one year in accordance with K.S.A. 75-2942(¶), (R. 55), which request was denied by the Secretary of the Civil Service Board. (R. 55)

Thereafter, Petitioner filed proceedings before the Civil Service Board in the nature of a "Motion for Rehearing and Reconsideration" which was denied by the Civil Service Board in its minutes of May 11, 1970, stating as follows:

> "The Board reviewed the request for rehearing for Lorene Thompson requested by Mary Schowengerdt, attorney for Miss Thompson. It was the decision of the Board that it does not have jurisdiction over the matter. (R. 55, 56)

C. THE DISTRICT COURT PROCEEDINGS

The Court proceedings in this case were commenced on the 21st day of May, 1970, with the filing of a petition in

which the course of the matter through the administrative agencies was summarized, in which it was alleged that the actions of all of the Defendants had been arbitrary, capricious, oppressive and illegal, and in which the prayer for relief was "an order of reinstatement of the Plaintiff as Supervisor of Vocational Rehabilitation at Topeka State Hospital and payment to her of all salary that has been lost by reason of such dismissal, together with concomitant retirement and other benefits . . ." and that "the Court grant the Plaintiff all further relief in the premises which to it may appear just and equitable." (R. 9-30)

Also filed on the same date, May 21, 1970, was a Notice of Appeal, In the Matter of the Appeal of Lorene Thompson, a Classified Civil Service Employee, No. 113,184, being an appeal both from the Civil Service Board ruling of April 3, 1969, sustaining the dismissal and directing that the name of the Plaintiff be placed on the register of qualified Vocational Rehabilitation Counselors, and also the ruling of May 11, 1970, refusing to hear the Plaintiff's Motion for Rehearing and Reconsideration. (R. 30-31)

By Court Order of June 5, 1970, the Case Nos. 113,184 and 113,185 were consolidated and the Defendants ordered to bring up records in the nature of Plaintiff's Personnel File, Vocational Rehabilitation Register and Certification records and minutes of the Civil Service Board for the preceding two-year period. (R. 32-33)

In the District Court cases, Defendants responded by the filing of the following motions: Defendant, Board of Social Welfare filed a Motion to Dismiss in Case No. 113,184 and a Motion to Dismiss in Case No. 113,185. A Motion to Dismiss on behalf of the Defendants and each of them with the exception of the State Board of Social Welfare was filed in Case No. 113,185. Plaintiff filed a Motion for the Determination of the Appropriate Remedy. (R. 33-38) The Court received both written briefs and oral arguments on the Motions, after which both Motions in Case No. 113,185 were overruled and the Motion in Case No. 113,184 was sustained, upon stipulation of the parties that the provisions of K.S.A. 60-2101(a) are inapplicable to rulings and decisions of the Civil Service Board. (R. 40-53)

Plaintiff, however, took the position that there was a valid basis of jurisdiction in both the direct appeal and the independent action in equity, but assented to proceeding in the Equity action upon stipulation of all parties and approval of the Court. (R. 49, 50)

After obtaining discovery by REQUEST FOR ADMISSIONS (R. 53-56), Plaintiff filed on September 15, 1970, an extensive Motion for Summary Judgment, urging the following pertinent points: (1) Unconstitutionality of the Summary Dismissal; (2) Illegality of dismissal without following the State's own dismissal regulation; (3) Unconstitutionality of action of Civil Service Board in sustaining an unconstitutional, illegal dismissal; (4) That

the Civil Service Board was acting under a policy of "sustaining dismissals contrary to statutory authority; (5) That failure of the Board to make written findings of fact was a violation of due process and; (6) That Defendant agencies had violated the law in failing to rehire Plaintiff during the year of eligibility and (7) That proper relief was restoration to the position, and payment of costs and expenses, including attorney's fees.

In its Memorandum Decision, dated December 14, 1970, the Court ruled that Plaintiff was entitled to an Order of Reinstatement of her position as Supervisor of Vocational Rehabilitation at Topeka State Hospital and for payment to her of all salary that has been lost by reason of such dismissal and for her attorney fees and costs. (App. 46a) (R. 62-72)

Defendants responded by filing a Motion for Rehearing, contending that they were not afforded an opportunity to submit evidence in the case. On January 15, 1971, the motion was granted and Defendants allowed time to furnish additional evidence. This was provided in the form of the transcript of the hearing before the Civil Service Board, and the matter thereupon again submitted to the Court upon written briefs. (App. 70a) (R. 73)

In its Memorandum Decision dated February 18, 1971, the Court reaffirmed its original ruling and set a pretrial conference to be had in connection with Plaintiff's Motion for Determination of

Back Pay and Attorney's fees. At this pretrial conference, it was determined that the remaining issues in the case were (1) Mitigation of damages and; (2) Reasonable value of attorney's services. (R. 80-85)

On April 23, 1971, an evidentiary hearing was held at which Defendants offered their evidence on the issue of mitigation of damages and Plaintiff offered rebuttal testimony. Plaintiff offered her evidence on the issue of appropriate amount of attorney's fees to be allowed in this case. Defendants offered no rebuttal testimony on the issue of attorney's fees. .(R. 85-103)

The matter was then taken under advisement on briefs submitted by counsel, and on June 24, 1971, the Court rendered its third Memorandum Decision, in which it reaffirmed its two previous rulings, except as to the allowance of attorney's fees, which were denied. (R. 107-108)

Appellants-Defendants appealed from the June 30, 1971, judgment of the Court (App. G) with respect to the reinstatement to the position and back pay since dismissal, plus other entitlements. The Plaintiff-Appellee cross-appealed from the June 30, 1971, judgment of the Court on the issue of attorney's fees only. (R. 108-115, 119)

RAISING THE FEDERAL QUESTIONS

A. Administrative deprivation of Constitutional right without due process of law: (Fed. Question A I.)

Petitioner raised the question of violation of due process under the Fourteenth Amendment by the Defendants in her original Petition (R. 12) and more specifically and extensively in the Motion for Summary Judgment, in innumerable briefs and oral arguments in the trial court and again in her Supreme Court Brief and argument. The trial Court reiterated and emphasized in each of its Memorandum Decisions and judgment the violations of Fourteenth Amendment due process both in the Dismissal itself and the Civil Service Board proceeding sustaining the same. (App. D, E, F and G)

B. Judicial deprivation of Constitutional right without due process: (Fed. Question B, I and II)

There was no occasion for the Petitioner to raise the serious questions of judicial denial of due process involved in questions B I. and II. in the trial court since both respondents and the Court during the entire 13 months' pendency of the District Court action assented to and accepted the Court's equitable jurisdiction. The Court order of July 17, 1970, declaring equitable jurisdiction (R. 52) has never been appealed from by any of the respondents in this case.

The position that K.S.A. 2101(a) constituted an "exclusive remedy" in the premises was raised for the first time in Defendants' Statement of Points in the Kansas Supreme Court proceeding (R. 3) and in their subsequent Brief.

Petitioner used her first opportunity under Kansas Supreme Court procedure to raise the Constitutional objection to such a position in her Brief (R. II) by arguing that such a position would be unconstitutional as a violation of the Fourteenth Amendment due process clause, and also in clear conflict with case precedents established by Kansas law itself. (R. II)

After the January 22, 1970, decision in which the Kansas Supreme Court stated that it would raise the so-called "jurisdictional" question on its own motion and on a theory of basis for choice of remedy diametrically opposed to that of all parties and the Court in the trial Court, Petitioner again renewed the vigorous contentions already contained in her Brief prior to the Supreme Court ruling. (R.III) But the Court denied the Motion for Rehearing without opinion and therefore without any discussion of the serious Constitutional questions raised by the Petitioner.

Thus, there exists here a situation in which the decision of the Supreme Court itself has unexpectedly given rise to the federal questions B I. & II., which Petitioner had no prior opportunity to assert except in the fashion above described.

REASONS FOR GRANTING THE WRIT

A. I. A GROSS INJUSTICE HAS BEEN PERPETRATED ON THIS PETITIONER AND PRECIOUS PRINCIPLES OF CONSTITUTIONAL RIGHTS VIOLATED BY THE DEPRIVATION

OF PETITIONER'S CIVIL SERVICE EMPLOYMENT AND FREEDOM TO PRACTICE HER CHOSEN PROFESSION WITHOUT AFFORDING HER A SINGLE ONE OF THE MOST BASIC TRADITIONAL SAFEGUARDS IMPLICIT IN DUE PROCESS: REASONABLE ADVANCE NOTICE, SPECIFICATION OF GROUNDS AND OPPORTUNITY TO BE HEARD.

1. This case is devoid of a showing on the part of the State that there was any legal consideration dictating the summary severance of the substantial Constitutional right. This clearly distinguishes the case from those where the Court is called upon to weigh serious problems of national security or clear and imminent danger to the public.

2. In this case the extent and severity of the injury to the individual is incalculable, falling just short of the deprivation of life or liberty involved in a criminal proceeding. The Petitioner's profession is vocational rehabilitation counseling, for which she is well trained, experienced and capable. (App. 50a) The government has a virtual monopoly of employment in Petitioner's specialty.[1]

> "It became obvious after the year expired in which she was denied work that from a practical point of view her summary dismissal from

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[1] Olson v. Regents of University of Minnesota, 301 F. Supp. 1356, quoting with approval, Van Alstyne, W.W., "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 Harv. L. Rev. 1439 (1968)

her civil service position had the effect of permanently precluding her from carrying out her profession in the state."[1]

Thus, inherent in the summary dismissal is the same seriousness of the revocation of a license to practice a profession such as law or medicine which Courts construe as penal in nature. It is closely analogous to the Constitutional right involved in Greene v. McElroy, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed 2d 1377 (1958) in which this Court emphasized the important property right in Petitioner's employment and the deprivation of liberty in the fact that Petitioner had been denied the freedom to practice his chosen profession.

3. Although this precise question is a matter of first impression in this Court, other Courts, both federal and state, have ruled squarely and strongly in favor of Petitioner's position:

(a) Olson v. Regents of Univ. of Minnesota, supra, holding that the Constitutional rights of a civil service employee had been violated where he was discharged without advance written notice and time to respond.

(b) Frates v. Burnett, 9 Cal. App. 3d 63, 87 Cal. Rptr. 731, holding that failure of a school district to provide for or give a maintenance mechanic notice of charges and a hearing before dismissing him constituted a denial of due process.

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[1]Memorandum Decision of Trial Court, App. p. 45a, 46a.

Surely the right of the classified civil service employee of the State with well established tenure under the system, is equally entitled to due process protection as the right of an indigent to welfare assistance. If so, affirmative answer to Petitioner's Federal Question A I. is conclusively provided by the recent ruling of this Court in Goldberg v. Kelly, 397 U.S. 254; 90 S. Ct. 1011; 25 L. Ed 2d 287.

B I. THE KANSAS SUPREME COURT HAS CONSTRUED AND APPLIED A STATUTE (K.S.A. 60-2101(a) IN A MANNER REPUGNANT TO THE CONSTITUTION AND APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT, AND IN A MANNER DISRUPTIVE TO THE ORDERLY AND FAIR ADMINISTRATION OF JUSTICE IN THE STATE.

1. The State Supreme Court decision here attacked is repugnant to the United States Constitution and applicable decisions of this Court in that it interprets a State law so as to deny the Petitioner an opportunity for submitting the question of deprivation of a substantial Constitutional right to the determination of a judicial tribunal upon its own independent judgment as to both law and fact. The Kansas Court has heretofore determined that K.S.A. 60-2101(a) is strictly an "appeal"statute in the sense that it would not permit the Court: to "substitute its judgment for that of an administrative agency or tribunal," to have a new evidentiary hearing, or to set aside the administrative action for any reason other than proof of fraud, illegality, etc.,

apparent from the record as made and brought up from the administrative agency:

Lauber v. Firemen's Relief Association, 202 Kan. 564, 451 P. 2d 488,

Strader v. Kansas Public Employees Retirement System, 206 Kan. 392, 479 P. 2d 860.

This State decision then flies squarely in the face of Ohio Valley Water Co. v. Ben Avon Borough, et. al., 253 U.S. 287, 40 S. Ct. 527, 64 L. Ed. 908.[1]

The devastating effect of the "exclusive remedy" rule here under attack is to delegate all the fact finding functions and delineation of Constitutional safeguards to a quasi-judicial tribunal. This is tantamount to elevating the administrative "quasi-judicial" body to the status of a judicial tribunal, subject only to rigid direct appeal procedures, but at the same time immunizing it from the duty to provide the due process protection so inherent in the judicial process. This is a shocking abdication of the duty of the judiciary to protect due process rights of the individual against unconstitutional acts of the government itself, a contention strongly supported by the following current decisions of this Court:

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[1] See Western Distributing Company v. Public Service Commission of the State of Kansas, 58 F. 2d 239, a case which is identical to the procedural facts bearing upon this question, and in which the Tenth Circuit Court held squarely that the equitable action must be allowed to comply with the due process requirement above stated.

Bachellor v. Maryland, 90 S. Ct. 1312;

The American Oil Co. v. P. G. Neill, 85 S. Ct. 1130;

Douglas v. State of Alabama, 85 S. Ct. 1075;

Dennis v. Denver & Rio Grande Western Railroad Co., 84 S. Ct. 291;

Chicago R. I. & P. R. Co. v. Stude, 74 S. Ct. 290.

2. The decision is seriously disruptive to the orderly and fair administration of justice within the State in that it is and will continue to have the effect of causing a state of great confusion and chaos concerning proper procedures for obtaining judicial redress from unconstitutional or otherwise unlawful acts of administrative agencies. Under the Court's "exclusive remedy" rule, hinging exclusively on the application of the term, "quasi-judicial", every citizen confronted with any improper administrative action will be faced with the dilemma of having to guess whether such action will at some future date be determined to be "quasi-judicial" or ministerial in nature.

Under the Court's "exclusive remedy" rule, the whole concept of specific Statutes of Limitations has been abrogated in the field of Administrative Law, by forcing parties to sue in the Courts immediately under K.S.A. 2101(a) if the administrative act could even remotely be considered as "quasi-judicial" in order

to safeguard the right of judicial review. The inevitable effect is to deluge the Courts with a multitude of actions that, under an alternative, permissive remedy rule (as proclaimed in Western Distributing Co. v. Public Service Com., supra) would not have needed to be filed at all, and to ring the death knell on the whole concept of compromise and settlement prior to commencement of litigation in the Courts.

The Court's "exclusive remedy" rule here was also applied in utter disregard of the Doctrine of Exhaustion of Administrative Remedies. Notice the Court held that this Petitioner was compelled to appeal within thirty (30) days of the first Civil Service Board ruling (April 3, 1969), totally ignoring her right to exhaust all administrative remedies regarding the total controversy and then to appeal within thirty (30) days of the final administrative action. (May 11, 1970)

B. II. THE STATE SUPREME COURT IN THE DECISION HERE ATTACKED HAS DEPRIVED THIS PETITIONER OF A SUBSTANTIAL CONSTITUTIONAL RIGHT AND PERMITTED A GROSS MISCARRIAGE OF JUSTICE:

1. BY ESTABLISHING A NEW, "EXCLUSIVE" RULE AND APPLYING THE SAME RETROACTIVELY AND INACCURATELY SO AS TO DEPRIVE THE PETITIONER OF ANY JUDICIAL REMEDY TO CORRECT THE UNCONSTITUTIONAL ACTS OF THE STATE ADMINISTRATIVE BODIES.

2. BY APPLYING SUCH "EXCLUSIVE REMEDY" RULE ON ITS OWN MOTION IN TOTAL CONTRADICTION TO THE CLEAR, COMMITTED, AND UNAPPEALED POSITION OF THE STATE ACTING IN ALL ITS CAPACITIES PRIOR TO PENDENCY BEFORE STATE SUPREME COURT.

1. The State Supreme Court has deprived the Petitioner of due process since its ruling on the procedural point and misapplication to the record under review absolutely denied Petitioner of any judicial relief from a gross administrative violation of due process. The record is clear that from the moment of Petitioner's summary dismissal Petitioner has been engaged in a zealous and conscientious attempt to pursue all administrative remedies possible, and upon their exhaustion to seek legal redress in the Courts. The acceptance and exercise of equitable jurisdiction of the trial court was fully justified under general principles of law and stare decisis of Kansas itself, regardless of how the Kansas Supreme Court later chose to define and apply the term, "quasi-judicial".

The record is also clear that the equitable action under review insofar as the facet thereof actually brought into issue, and decided by the trial court on summary judgment and therefore involved in the State Supreme Court appeal, was against Defendant, Board of Social Welfare, regarding a ministerial duty, making the Court's ruling on points of law patently inapplicable to the facts of the case.

In common parlance, what the Kansas Supreme Court has done here is to change the rules after the game is over, and

misapplied them to the facts, so as to permit the perpetration of a gross injustice. The unusual harshness of the Court's ruling could have easily been avoided as strongly advocated by the dissenting opinion of Justice Owsley strenously espousing a prospective rather than a retrospective application in this case to prevent a gross injustice. (App. pages 12a - 23a)

Stated in the most basic Constitutional terms, the Kansas Supreme Court here simply had no jurisdiction to deprive the District Court of jurisdiction to grant equitable relief by acting itself in an unconstitutional manner to deprive Petitioner of due process of law altogether.

2. In raising the so-called "question of jurisdiction" on its own motion (Syl. No. 3) the State Supreme Court has fallen into the tragic error of confusing jurisdiction (the power to hear and act) with the means or method of exercising jurisdiction. Jurisdiction of the subject matter in this case is simply the power to review the administrative acts for possible unconstitutionality or other illegality. The proposition that Courts have such power is axiomatic. The question then is as to the appropriate remedy to be applied in the exercise of such power (here, direct appeal or independent action in equity) and the timeliness thereof. These are matters clearly subject to well settled principles of Stipulation of parties, Waiver and Estoppel.

The record in this case represents a glaring example of the State taking a positive position ever since the enactment of K.S.A. 2101(a) that an independent

action was the only remedy under Kansas law by which one could obtain judicial relief in civil service cases. (Record pages 35, 36, 40-53)

The Petitioner and the trial court relied in good faith upon such clear, committed and unappealed position of the State in all its capacities and proper relief was granted on the basis thereof after thirteen months of a carefully and competently conducted judicial due process proceeding. For the State in its capacity as respondent administrative agencies to stipulate that the action in equity constituted the proper remedy here; to assent to the exercise of such equitable jurisdiction during the whole course of the trial court proceeding; and then to fail even in its final appeal to appeal on this point, constituted a clear-cut case for application of the doctrines of Waiver and Estoppel and the Appeal and Error doctrine that a party shall not be permitted to take a position on appeal diametrically opposed to the one taken in the court below, (which points are firmly fixed in Kansas law and strongly urged in Petitioner's Brief in the Kansas Supreme Court).

See Glus v. Brooklyn Eastern Terminal, 359 U.S. 231, 79 S. Ct. 760, 3 L. Ed. 2 770, where this Court held that the government should be estopped from pleading even a specific three-year statute of limitations in a situation where Petitioner could show that a government agent had misled Petitioner into a good faith belief that he could begin his action at any time within seven years. As succinctly stated by the Court:

> "To decide this case we need look no further than the maxim that no man may take advantage of his own wrong." (page 232)

Nor can State governments either, under modern concepts of Fourteenth Amendment due process requirements, be exempted from judicial correction by committing further errors which in effect constitute an entrapment of the individual attempting to deal in good faith reliance upon the committed position of the State.

A closely analogous case is that of Raley v. Ohio, 360 U.S. 423, 79 S. Ct. 1257; 3 L. Ed. 2 1344, where this Court reversed a State Supreme Court on precisely the same grounds as now being urged: That the due process clause of the Constitution has been breached under circumstances where Petitioners are entrapped by the voice of the State speaking unequivocally for the right asserted by the individual, only to have that same right struck down by the overriding voice of the State Supreme Court.

C. SPECIAL CONSIDERATIONS

The special and important nature of the substantial federal questions here rests upon many of the most firmly fixed principles of fairness forged and refined by many years of case law development in this Court in the due process area. To summarize, this Petition places squarely before this Court a case of patent and devastating denial of due process by both the administrative and judicial branches of State government represented by:

(1) A serious severance of both property and liberty rights in flagrant violation of the most fundamental requirements of due process.

(2) The compounding of the wrong by the State in its failure to deal in good faith and according to law during the year in which Petitioner in good faith was exhausting her administrative remedies and attempting to resolve the controversy without resort to the Courts.

(3) The cataclysmic cancellation of judicial relief properly granted by the trial court in an appellate decision which clearly construes a State Statute, K.S.A. 60-2101(a) unconstitutionally and contrary to U.S. Supreme Court decisions; and denies the Petitioner judicial due process altogether by establishing a new rule and applying the same retroactively on its own motion in total contradiction to the clear, committed and unappealed position of the State in all its capacities.

But there is still another special consideration which Petitioner feels compelled to articulate as an additional, highly significant ground for the granting of a Writ herein. This particular Petition provides the Court with a rare and unique opportunity to enforce the Constitution for a vast majority of American citizens heretofore unprotected Constitutionally solely and simply for lack of sufficient economic resources to bear the financial burden of major, protracted litigation against the government for denial of Constitutional rights.

Undoubtedly one of the most profound dilemmas in the administration of justice is the striking of a balance between two equally important considerations. One is the establishment of sufficient machinery for the accurate judicial determination of legal controversies between the citizen and his government. The other is making available such machinery equally to the government and the citizen so that both stand truly equal before the Bar of Justice.

The law has made giant strides in recent history with regard to providing indigent persons with the means for practical access to the Courts. This is very much in keeping with the laudable objective that "any person" must include the man of no means as well as the man of great means. But what of the vast majority of citizens of moderate means who can and desire to pay for the ordinary legal services incident to modern life, but simply are no economic match, regardless of the merits of a given case, when arrayed against the limitless economic power of the State to litigate indefinitely against them?

As the ultimate guardian of the Constitutional rights of all people in this country, this Court is provided in this case with a rare opportunity to demonstrate anew the strength and universality of the Constitution; to declare that "any person", though he be one solitary citizen of moderate means, can live in this country with the security of life, liberty and property against unconstitutional confiscation thereof by the government itself.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted and this Court review the opinions and judgments of the Supreme Court of Kansas herein alleged to be unconstitutional.

Respectfully submitted,

Mary Rebecca Schowengerdt
Robert R. Irwin, Jr.
1520 First National
Bank Tower
Topeka, Kansas 66603
Attorneys for the
Petitioner

APPENDIX

APPENDIX A

SUPREME COURT OF KANSAS

Thompson v. Amis

No. 46,487

LORENE THOMPSON, Appellee - Cross-Appellant, v. GEORGE C. AMIS, HENRY J. RIOJAS, THEODORE K. SHARP, as members of the Civil Service Board of Kansas; and GEORGE C. AMIS, HENRY J. RIOJAS, and THEODORE K. SHARP, individually; and WALTER F. KUIKEN, Secretary of the Civil Service Board of Kansas; and WALTER F. KUIKEN, individually; and the DEPARTMENT OF ADMINISTRATION of the State of Kansas; and the STATE BOARD OF SOCIAL WELFARE of the State of Kansas, Appellants - Cross-Appellees.

SYLLABUS BY THE COURT

1. APPEAL AND ERROR--Errors Acquiesced in--Review. Ordinarily, trial errors in which a party acquiesces, or encourages the district court to make, cannot be raised on appeal, but the rule does not apply where the error involves jurisdiction of the subject matter.

2. SAME--Jurisdiction of District Court--Jurisdiction on Appeal. Where the district court had no jurisdiction of the subject matter, this court does not acquire jurisdiction of the subject matter by appeal from a judgment of the district court.

3. SAME--Jurisdiction--Raising Question. This court will raise the question of jurisdiction on its own motion.

4. JUDGES--Extent of Jurisdiction. Judges of the district court are expressly created by the Constitution of Kansas, and are given only such jurisdiction as may be provided by the Legislature.

5. COURTS--Quasi-judicial Decisions--Jurisdiction to Review--Equitable Action--No Jurisdiction to Review Errors. Where a district court has appellate jurisdiction to review the decisions of a quasi-judicial body, it has no jurisdiction in an independent equitable action to review alleged errors.

6. ADMINISTRATIVE BODIES--"Quasi-judicial" Function. The term "quasi-judicial" is applied to administrative boards or officers empowered to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of a judicial nature.

7. SAME--Civil Service Board--Quasi-judicial" Functions--Remedy. The Civil Service Board of Kansas exercises quasi-judicial functions and if a party is aggrieved by its order, the remedy is by appeal pursuant to K.S.A. 60-2101(a), which remedy is exclusive.

Appeal from Shawnee district court, division No. 4; DAVID PRAGER, judge. Opinion filed January 22, 1972. Reversed with directions.

Franklin R. Theis, assistant attorney general, argued the cause, and Woody D. Smith, attorney for the Department of Social Welfare, and Vern Miller, attorney general, were with him on the brief for appellants - cross-appellees.

Mary Schowengerdt, of Irwin Irwin & Schowengerdt, of Topeka, argued the cause, and Robert R. Irwin, of the same firm, was with her on the brief for appellee - cross-appellant.

The opinion of the court was delivered by

FATZER, C. J.: This appeal stems from a controversy over the discharge of a classified civil service employee.

The question immediately before the court is one of procedure involving jurisdiction. The facts material to the disposition of that question are first presented.

On August 1, 1968, the plaintiff, Lorene Thompson, was promoted to the position of Supervisor of Vocational Rehabilitation for the Topeka State Hospital, and as of November 30, 1968, she was granted permanent status. On February 17, 1969, she was orally dismissed from her position by the Acting Director of the Division of Vocational Rehabilitation of the State of Kansas. The first written notice of her oral dismissal was given by letter dated February 19, 1969.

The plaintiff gave notice of her intention to appeal her dismissal by a

letter dated February 20, 1969, directed to the Chairman of the Civil Service Board of the State of Kansas (the board), requesting a hearing with respect to the dismissal. The board, on March 27, 1969, and again on April 3, 1969, conducted a hearing in the matter. On April 3, 1969, the Board announced its decision which was made a part of its minutes, and reads:

"'The hearing for E. Lorene Thompson, Vocational Rehabilitation Supervisor, Department of Social Welfare, was resumed at 10:30 a.m. At the conclusion of the hearing, it was the decision of the Board that the action of the appointing authority in dismissing Miss Thompson be sustained. The Personnel Director was directed to place the name of Miss Thompson on the eligible register for Vocational Rehabilitation Counselor for a period of one year.'"

The secretary of the Board directed a letter to the plaintiff reporting its decision. Thereafter, and on April 3, 1970, the plaintiff delivered a letter to the Director of the personnel division requesting that her term of eligibility be extended for a period of one year pursuant to K.S.A. 75-2942 (2). She also filed a motion for rehearing and reconsideration. The Board's decision on that motion was reported in its minutes of May 11, 1970, and reads:

"'The board reviewed the request for re-hearing for Lorene Thompson requested by Mary Schowengerdt, attorney for Miss Thompson. It was the decision of the Board that it does not have jurisdiction over the matter.'"

Plaintiff's counsel was informed of the Board's decision by letter dated May 12, 1970. On May 21, 1970, the plaintiff filed two cases in the district court seeking relief from the decisions of the Board--one was a direct appeal; the other was an action in equity.

On June 3, 1970, the Board filed a motion to dismiss the action in equity on the ground it was immune from actions except on its contracts, and that plaintiff's petition failed to allege the purported cause of action was based on contract. The board also filed a motion to dismiss the appeal for the reason the functions of the board were administrative, not judicial in character, and, therefore, not subject to review under K.S.A. 60-2101(a).

On June 24, 1970, the plaintiff filed a motion for determination of the appropriate remedy--direct appeal or action in equity.

At the hearing on the motion for the determination of the proper remedy, counsel for all parties agreed that the remedy was an action in equity for relief in the form of mandamus, and that the appeal statute (K.S.A. 60-2101 [a]) had no application. The Court then ruled:

"All right. The motion of the plaintiff for a determination of an appropriate remedy then is sustained and it is determined that the proper method of attacking the legality or the propriety or correctness of a decision of the State Civil Service

Board is through an independent action in equity which in this case has been brought in Case No. 113,185. But the court is not at this time determining the correctness of the remedy or the appropriateness of the facts alleged in the petition but only the fact that the Court does have jurisdiction in that case to consider the matters of dispute between the plaintiff and the State Board of Social Welfare. Now, do you have anything else to present on your motion in Case No. 113,185?"

Thereafter, the plaintiff filed a motion for judgment on the pleadings in the equity case. The motion was sustained, the court finding that plaintiff was entitled to be restored to her position as Vocational Rehabilitation Supervisor with the State Department of Social Welfare, and that she should be reimbursed for the salary which she had lost because of her wrongful dismissal.

Following a motion for rehearing and a motion by plaintiff for attorney fees, an order of summary judgment was entered on June 30, 1971, placing in the judgment the findings above mentioned, but denying attorney fees.

The Board, the Department of Administration, and the Board of Social Welfare, all statutory agencies of the state of Kansas, appealed from the order reinstating the plaintiff to her position of Vocational Rehabilitation Supervisor and reimbursing her for lost salary. The plaintiff cross-appealed from the order denying her attorney fees.

The appellants contend that an appeal pursuant to K.S.A. 60-2101 (a) from the Board's decision of April 3, 1969, was the only procedural remedy available to the appellee.

Before considering this question, we are met with the appellee's contention the appellants took no appeal from the court's order adjudging that the appellee's remedy was by an equitable action and not by appeal under K.S.A. 60-2101 (a), but actually encouraged the district court to make such an order and they are now foreclosed from raising such an issue.

Ordinarily, trial errors in which a party acquiesces or encourages the district court to make cannot be raised on appeal. A party should not be permitted to assume an attitude in this court inconsistent with that taken in the court below. (Brown v. East Side National Bank, 196 Kan. 372, 376, 411 P. 2d 605; Potwin State Bank v. Ward, 183 Kan. 475, 327 P. 2d 1091, 80 A.L.R. 2d 166.) However, the rule above stated does not apply where the question is one of jurisdiction of the subject matter. If the district court had no jurisdiction, then this court has no jurisdiction. In Knowing v. Douglas County Kaw Drainage Dist., 167 Kan. 387, 207 P. 2d 457, we held:

"Where the district court had no jurisdiction of the subject matter of an appeal to it, this court does not acquire such jurisdiction by an appeal from a ruling of the district court." (Syl. ¶2.)

This court will raise the jurisdictional question on its own motion. (Materi v. Spurrier, 192 Kan. 291, 387 P. 2d 221; Bammes v. Viking Manufacturing Co., 192 Kan. 616, 389 P. 2d 828; Hotchkiss v. White, 191 Kan. 534, 538, 382 P. 2d 325; Lira v. Billings, 196 Kan. 726, 414 P. 2d 13.)

The appellants argue the issue before us is one of jurisdiction. We agree. The district courts are expressly created by the Constitution of the state of Kansas and are given only such jurisdiction as may be provided by the Legislature. (Art. 3, §6; State v. Jack, 69 Kan. 387, 392, 76 Pac. 911, affirmed 199 U.S. 372, 50 L. Ed. 234, 26 S. Ct. 73; City of McPherson v. State Corporation Commission, 174 Kan. 407, 411, 257 P. 2d 123.) If the district court had no appellate jurisdiction over the decision of the Board, then it had equitable jurisdiction to determine whether the Board's acts were illegal, fraudulent, or oppressive. (Gray v. Jenkins, 183 Kan. 251, 326 P. 2d 319.) If the district court had appellate jurisdiction, then it had no jurisdiction in an independent equitable action to review alleged errors of the Board. (Pelican Transfer & Storage v. Kansas Corporation Commission, 195 Kan. 76, 402 P. 2d 762; Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System, 205 Kan. 780, 473 P. 2d 72; Neagle v. Brooks, 203 Kan. 323, 454 P. 2d 544.) See, also, Northern Natural Gas Company v. Dwyer, 208 Kan. 337, _____ P. 2d _____, and Powers v. State Department of Social Welfare [No. 46,205], 208 Kan. _____, _____ P. 2d _____, this day decided.

The appellee relies heavily on Gray, supra, where we said that the Board acts quasi-judicially, but that no statutory provision for appeal to the courts is made from an order of the State Civil Service Board, either under the Civil Service statutes, or under the code of civil procedure. The Gray case was decided in 1958. Following the decision in that case, the Legislature enacted the new code of civil procedure effective January 1, 1964, which specifically provided for appeals from Administrative Boards exercising quasi-judicial functions. (K.S.A. 60-2101[a].) Insofar as here pertinent, that statute reads:

"A judgment rendered or final order made by a court or any other tribunal, board or officer exercising judicial or quasi-judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court. If no other means for perfecting such an appeal is provided by law, it shall be sufficient for an aggrieved party to file a notice that he is appealing from such judgment or order with such court, tribunal, board or officer within thirty (30) days of its entry, and then causing true copies of all pertinent proceedings before such court, tribunal, board or officer to be prepared and filed with the clerk of the district court of the county in which such judgment or order was entered. The clerk shall thereupon docket the same as an action in the district court, which court shall then proceed to review the same, either with or without additional pleadings and evidence, and enter such order or judgment as justice shall require . . ."

It is noted the statute as written includes boards or officers exercising quasi-judicial functions.

In Gawith v. Gage's Plumbing & Heating Co., Inc., 206 Kan. 169, 476 P. 2d 966, certain rules were laid down for determining whether an administrative agency performs legislative or judicial functions. We held:

"There is a distinction between the types of decisions rendered by different administrative agencies; and some such agencies perform judicial or quasi-judicial functions while others do not.

"In determining whether an administrative agency performs legislative or judicial functions, the courts rely on certain tests; one being whether the court could have been charged in the first instance with the responsibility of making the decisions the administrative body must make, and another being whether the function the administrative agency performs is one that courts historically have been accustomed to perform and had performed prior to the creation of the administrative body.

"A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist, whereas legislation looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

"In applying tests to distinguish legislative from judicial powers, courts have recognized that it is the nature of the act performed, rather than the name of the officer or agency which performs it, that determines its character as judicial or otherwise." (Syl. ¶¶1, 2, 3, 4.)

It may be added that quasi-judicial is a term applied to administrative boards or officers empowered to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of judicial nature.

The Board is empowered by statute to hear appeals of dismissed employees and determine the reasonableness of the dismissal (K.S.A. 75-2949[2]), and after considering the evidence, it may order reinstatement of the employee and the payment of loss of salary. (K.S.A. 75-2949[3] [4].) The Board has authority to establish rules (75-2949 [5]); to conduct hearings; to administer oaths and take testimony; to issue subpoenas to compel attendance of witnesses; to take depositions, and to require the production of documents pertinent to any inquiry or investigation authorized by the Civil Service Act (75-2932 [1-4]).

Giving consideration to the various provisions of the Civil Service Act and the plenary power lodged in the Board by the legislature, we conclude it exercises quasi-judicial functions in the performance of its duties. That being the case, the procedure for appellate review in the district court provided in K.S.A. 60-2101 (a) was exclusive, and the appellee was required to invoke that procedure

within thirty days after entry of the Board's order of April 3, 1969, sustaining the action of the appointing authority dismissing her from service.

It follows the district court was without jurisdiction to determine the reasonableness of the Board's order in the original action in equity, and it erred in rendering judgment granting the appellee relief.

What has been said renders unnecessary the determination of other questions raised by the parties.

The case is remanded to the district court with directions to dismiss the equity action.

It is so ordered.

PRAGER, J., not participating.

OWSLEY, J., dissenting: The majority opinion declares that plaintiff's remedy, after her dismissal was sustained by the Civil Service Board, was by appeal and that appeal was an exclusive remedy. This opinion disposes of this case on a procedural point without any concern for the gross injustice resulting therefrom. It is difficult to perceive why the majority of this Court approved this opinion without any effort to consider means of avoiding its harshness and unfairness. Perhaps after my period of infancy on the Court has passed I can develop a callousness in like situations, but I hope this never occurs.

Since a complete statement of the facts was not necessary to the majority opinion, reference thereto was limited. The trial court sustained a motion for summary judgment in favor of the plaintiff and in support thereof prepared and filed a "Rationale of the Decision." An extended quote therefrom is necessary to disclose the basis of this dissent:

"This Court finds beyond question that both the spirit and letter of the civil service statutes and regulations pertaining to the dismissal of a classified civil servant have been violated by the defendants in this case. If the position of the defendants in this case is correct, then the civil service laws of Kansas and the regulations thereunder are completely ineffective to establish any semblance of a state civil service system in the State of Kansas. . . .

"1. The act of the defendant . . . in summarily dismissing the plaintiff from her permanent position as a classified civil service employee without advance written notice specifying the grounds for dismissal and without affording her an opportunity to be heard prior to dismissal was in violation of procedural due process of law as required by the 14th Amendment to the Constitution of the United States . . . .

"2. The action of the defendant . . . in dismissing the plaintiff from her permanent position as a classified civil service employee was in direct violation of Kansas Department of Administration Regulations, Article 9, governing the dismissal of classified civil service employees.

. . . . . .

"In accordance with the provisions of K.S.A. 75-2943 heretofore discussed, regulations were adopted by the Civil Service Board pertaining to service ratings and how they should be considered in determining whether or not a civil service employee should be dismissed . . . In Regulation 1-9-2 the various appointing authorities are required to furnish service rating reports for each employee who is in the classified service. Each civil service employee is required to be rated by his immediate supervisor or by another qualified person designated by the appointing authority and each employee is required to be informed as to the standards on which his job performance is rated, his rating on each of these standards, and his final adjective rating. A classified employee may be rated as excellent, very good, satisfactory, fair or unsatisfactory. If an employee is rated as unsatisfactory he is to be so informed and has a right of appeal. Regulation 1-9-10 covers the subject of dismissal of an employee and the relevance and weight to be given to service ratings in connection with such dismissal. This regulation provides as follows:

'1-9-10. Dismissal. If the service rating assigned to a permanent employee is unsatisfactory (U) and if the employee does not make sufficient improvement in his job performance so that on a supplementary service report to be made two months later his service rating is fair (F) or better, the appointing authority may consider the service rating as cause for dismissing the employee.'

". . . What all these statutes and regulations mean is simply this: The question of dismissal of a permanent civil service employee is to be determined by his record over the long pull and not by a fit of pique or some temporary disagreement which might arise in the course of his work. Permanent civil service employees in Kansas are to be rated in accordance with the regulations periodically and if rated unsatisfactory, the appointing authority may consider the service rating as a cause for dismissing the employee. On occasions, of course, a situation may arise where the permanent civil service employee is guilty of dishonesty, moral turpitude, conviction of a crime or other severe infractions justifying summary action. This position is taken by the civil service board in the case involving Violet Cowan where the following statement was made in its decision by the Civil Service Board:

"Unless the Appointing Authority shall allege and prove, that the employee is guilty of dishonesty, moral turpitude, conviction of a crime or other severe infractions justifying summary action, it is fatal to the cause of the appointing authority, if it is shown that such appointing authority failed to:

'1. Follow any statutory requirements, or;

'2. Follow the rules and regulations of the Department of Administration, or;

'3. Follow the published rules and policies that that particular appointing

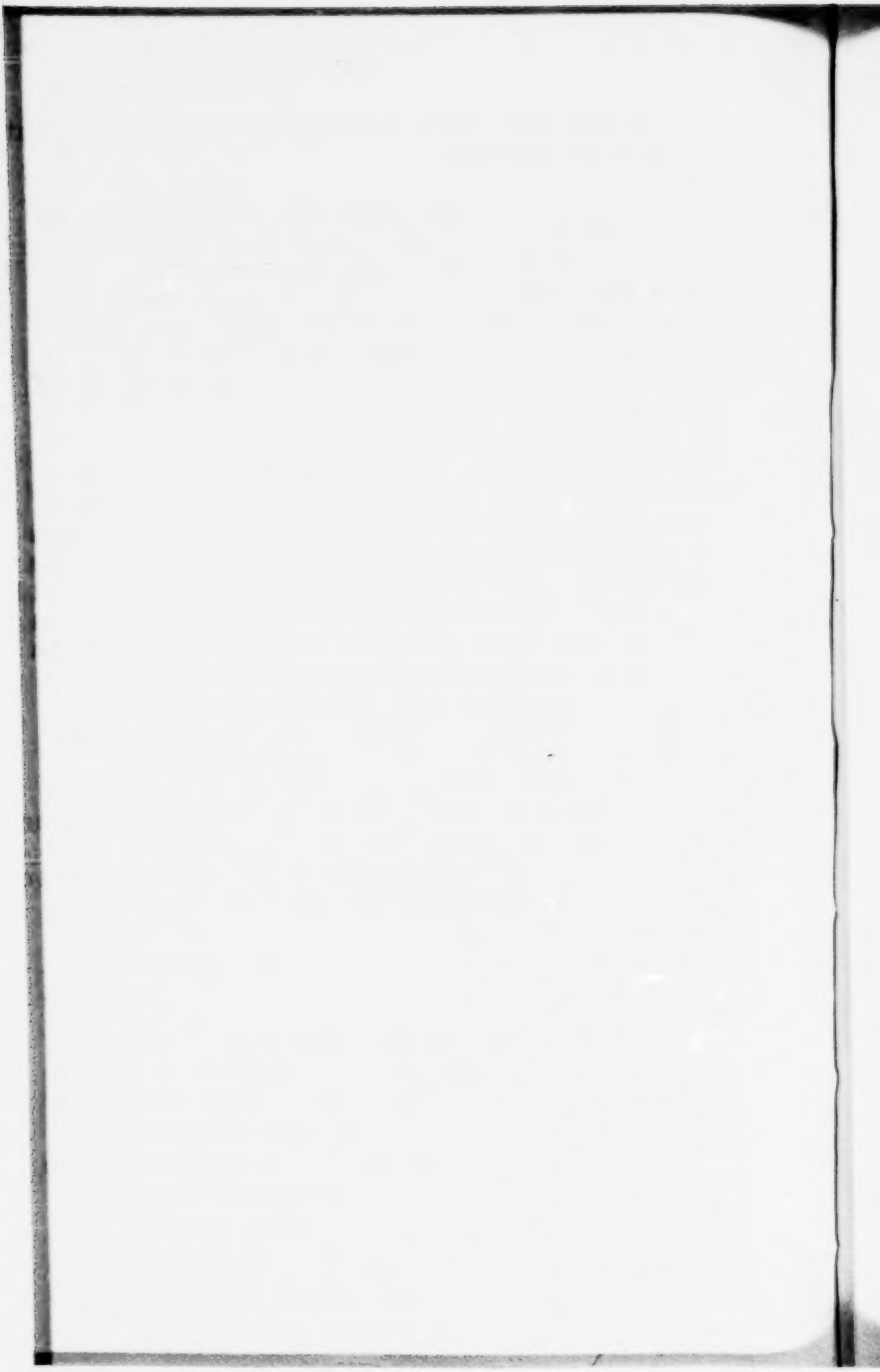
authority may have published and distributed to its personnel.'

"In the Cowan case the Civil Service Board held that the Board of Probation and Parole had disregarded and not followed regulation 1-9-10 just mentioned pertaining to dismissal and that the civil service employee Violet M. Cowan was entitled to be reinstated with pack pay.

"Counsel for the defendants argues that under the provisions of K.S.A. 75-2949 the appointing authority may dismiss any permanent classified employee when he considers that the good of the service will be served thereby. It is obvious to this Court that this section should be read in light of the other statutes pertaining to civil service and that an appointing authority cannot summarily, without just cause and without following the prescribed rules and regulations and procedures of the civil service board dismiss a permanent classified civil service employee without complying with the specific regulations established by the Civil Service Board.

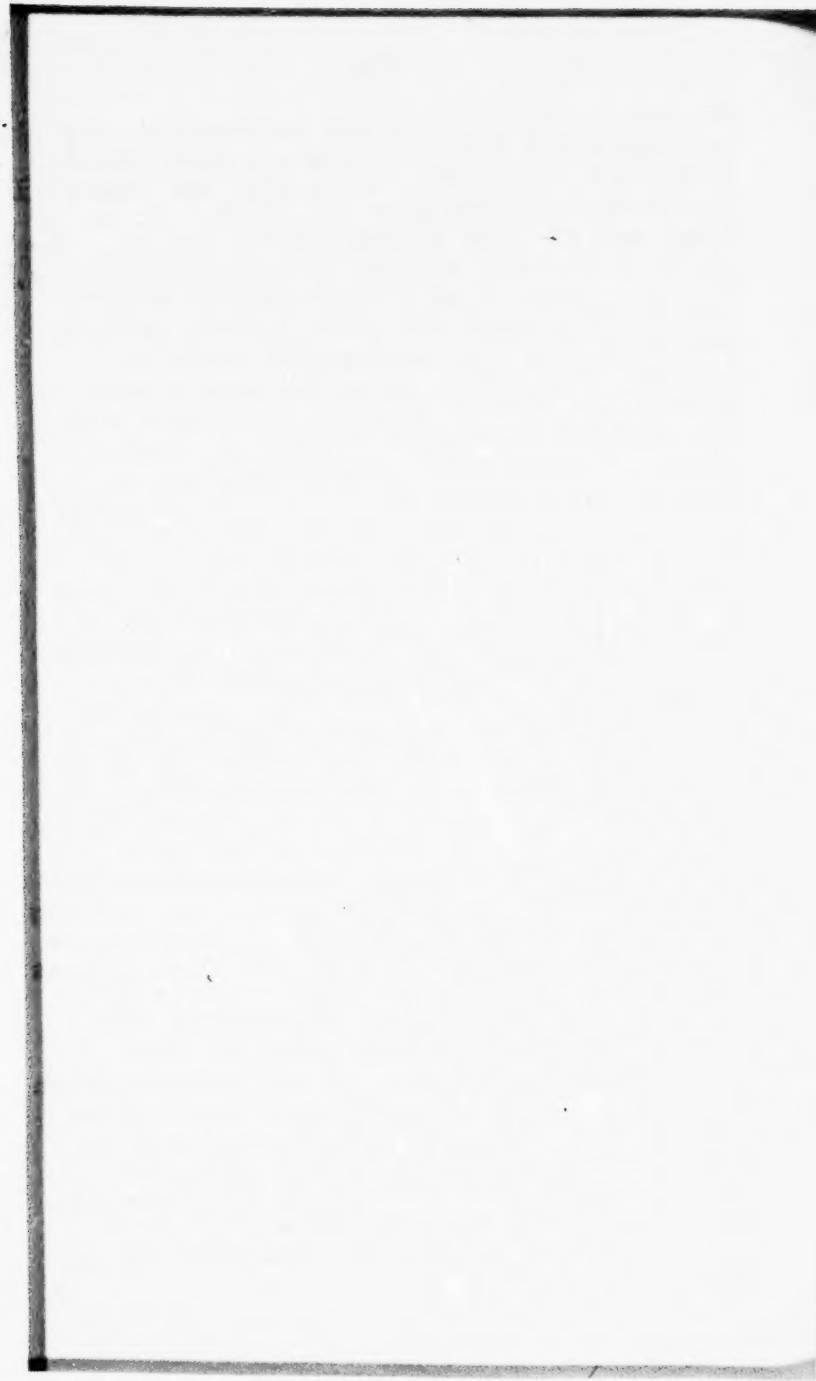
. . . . . .

"3. The evidence presented at the hearing before the Civil Service Board clearly could not justify a summary dismissal of plaintiff from her classified civil service position where there was no compliance with the appropriate civil service regulations discussed in the previous section. As pointed out in the statement of facts and as contained in the record, the plaintiff has a Masters



Degree in Rehabilitation Counseling and was employed continuously in that field from June 23, 1958, until she was summarily dismissed on February 17, 1969. At no time during this eleven years did she receive a service rating below satisfactory, and as a matter of fact received a rating of very good for most rating periods. The testimony was undisputed that on November 30, 1968, only two and a half months before her summary dismissal she was granted permanent status as supervisor of vocational rehabilitation at Topeka State Hospital . . . It is clear that all of the persons in positions of major administrative responsibility at Topeka State Hospital testified in favor of plaintiff . . . Not a single one of the vocational rehabilitation counselors at the hospital who worked with Miss Thompson at the hospital were called as witnesses and no one in authority at Topeka State Hospital was asked to testify on behalf of the appointing authority. . . .

". . . This Court has concluded that from the evidence presented at the hearing there is nothing whatsoever in the record to disclose any neglect of official duties, any act of dishonesty, moral turpitude, or any other misconduct justifying the summary action that was taken in this case. Certainly there is no justification for the failure of either the appointing authority or the Civil Service Board to require that existing regulations established for the protection of the civil service system be complied with. This was an illegal, arbitrary and capricious action.



"4. . . . The only trouble in this case is that the record shows that the plaintiff was treated in an extremely shabby manner and given the run around because of the nature of the decision of the Civil Service Board. The Civil Service Board in its ruling sustained the dismissal but ordered that she be restored to the eligible list as a qualified vocational rehabilitation counselor. This Court agrees with the position of plaintiff's counsel that the very nature of this ruling was the cause of the course pursued by the plaintiff during the following year. She was clearly placed in a position of walking a tight rope, doing on the one hand what would be reasonably and legitimately expected to effectuate a mutually satisfactory resolution of the problems through the usual proper administrative channels but on the other hand to protect and preserve her rights, if such negotiations should fail, to seek legal redress in the courts. . . ."

The plaintiff herein, following her dismissal and before the hearing before the Board, employed counsel. Her attorney, in counseling appellee, sought to advise her as to her right to appeal to the district court and as to her right to file an independent action, having in mind at all times the desire of appellee to be re-employed as a counselor within the year she remained eligible for re-employment.

Assuming that her counsel researched the law, and it appears that she did, she would have discovered the ruling of this court in Gray, which held that the dismissal

of a civil service employee was a ministerial function and therefor unappealabl . Since this was the only case decided by this court involving the Civil Service Board, she was fully justified in relying on it and advising her client to rely on it. In this situation, counsel could with confidence instruct her client to seek re-employment with her department since there was always available if she failed, an independent action to review the Board's decision. Counsel was also undoubtedly aware of our statement in City of Kansas City v. Jones & Laughlin Steel Corp., 187 Kan. 701, 360 P. 2d 29, where we said:

"However, the courts are always open to hear meritorious complaints against illegal or oppressive acts of non-judicial public boards and officials, either at the instance of the state or of a private citizen especially aggrieved thereby; but not by appeal where no statute confers a right of appeal. In the absence of a statutory right of appeal, judicial redress for illegal, fraudulent or oppressive official conduct must be invoked through some appropriate extraordinary legal remedy recognized in our practice--injunction, mandamus or quo warranto. (Citing cases.)"

After the time for appeal had passed, counsel undoubtedly discovered this court by its decisions in Lauber, Goetz, and Neeley initiated doubts as to the precedent established in Gray. Thus, counsel was duped. Possibly this has occurred before when this court has reflected and then corrected its decisions, but we hope not with the fatal consequences that occurred here.

It cannot be denied that the plaintiff lost her remedy as a result of the change in the law made after she had relied on the discarded rule. I do not believe that this court is charged to enforce jealously and blindly a new declaration of the law under circumstances which obviously and glaringly result in a wrong.

The majority opinion in effect overrules the Gray case. Ordinarily, a new judicial rule operates retroactively and hence governs the instant case. In the occasional situation where there has been substantial reliance on a precedent that a court now finds unsound, an injustice occurs.

I feel that there should be some exceptions to the usual retroactive operation of judicial decisions. The court is justified in this case in finding the rule of procedure declared in the majority opinion to have prospective application only.

I do not propose all deviations from precedence should operate prospectively, but only when retroactive application results in undue hardship upon a party that has justifiably relied on the old rule. The concern should be to not penalize a party for relying on a rule whose liquidation he could not reasonably foresee.

The application of the foregoing is not without support. In Gt. Northern Ry. v. Sunburst Co., 287 U.S. 358 (1932), 77 L. Ed. 360, 53 S. Ct. 145, the Supreme Court of the United States speaking through Justice Cardozo affirmed a ruling of the Supreme Court of Montana that an old precedent should apply to the considered case, but

the old precedent would be supplanted henceforth. The Court said beginning at page 364:

". . . A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. Tidal Oil Co. v. Flanagan, supra), that it must give them that effect; but never has doubt been expressed that it may so treat them if it pleases, whenever injustice or hardship will thereby be averted. (Citing Cases.) On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. (Citing Cases.) The alternative is the same whether the subject of the new decision is common law (Tidal Oil Co. v. Flanagan, supra) or statute. (Citing Cases.) The choice of any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring common law for those within her borders. The common law as adminis-

tered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule. If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process."

We have also determined in this state that departure from prececent may be retroactive or prospective. In Carroll v. Kittle, 203 Kan. 841, 457 P. 2d 21, we said:

". . . We find ample authority for the proposition that in departing from the rule of stare decisis, the court may restrict application of a newly established rule to the instant case, and cases arising in the future, where it is clear that the retrospective application of the new rule will result in a hardship to those who have relied upon prior decisions of the court."

The majority opinion cannot be justified on the grounds that there is no means to avoid the "shabby" treatment given the plaintiff by the defendant in view of what has been said herein.

(No separate or independent judgment entered by the Kansas Supreme Court other than that contained in the above and foregoing Opinion.)

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF KANSAS

Lorene Thompson, Appellee,	)	
	)	
v.	)	No. 46,487
	)	
George C. Amis, et al., Appellants.	)	
	)	

You are hereby notified of the following action taken in the above entitled case:

Motion for rehearing by Appellee.

Considered and denied.

Date: March 8, 1972

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

APPENDIX C

IN THE SUPREME COU
OF THE STATE OF KA

Lorene Thompson, Appellee,	)	
	)	
v.	)	No. 46,487
	)	
George C. Amis, et al., Appellants.	)	

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellee to Stay Mandate.

Allowed.

Date: May 15, 1972

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

APPENDIX D

IN THE DISTRICT COURT
OF SHAWNEE COUNTY KANSAS
Fourth Division

No. 113,185

LORENE THOMPSON, Plaintiff,

v.

GEORGE C. AMIS, HENRY J. RIOJAS, THEODORE K. SHARP, as members of the Civil Service Board of Kansas; and GEORGE C. AMIS, HENRY J. RIOJAS, and THEODORE K. SHARP, individually; and WALTER F. KUIKEN, Secretary of the Civil Service Board of Kansas; and WALTER F. KUIKEN, individually; and the DEPARTMENT OF ADMINISTRATION of the State of Kansas; and the STATE BOARD OF SOCIAL WELFARE of the State of Kansas,

Defendants.

MEMORANDUM DECISION

On October 23, 1970, the motion of the plaintiff for summary judgment was presented to the Court. Counsel presented oral arguments and then the motion was submitted. Counsel were allowed an opportunity to provide written briefs which have now been received. In her brief in support of plaintiff's motion, counsel for the plaintiff has provided an extensive statement of facts including various exhibits. In addition to this there was provided to the Court the entire employment record of plaintiff Lorene Thompson in the form of

her personnel file in the Department of Administration of the State of Kansas. Included in the employment record is a letter dated October 16, 1969, from Mary Schowengerdt, counsel for the plaintiff, to Dr. Robert Harder, Director of the State Department of Social Welfare. In this letter Miss Schowengerdt recites the substance of the testimony presented to the Civil Service Board at the time of the hearing of plaintiff's case. The plaintiff served upon counsel for defendants Requests for Admissions, paragraph 3 of which seeks defendants to admit as follows:

> "That for purposes of Plaintiff's Motion for Summary Judgment herein, and with respect to the standard or policy for determining whether the Appellant should be reinstated or whether the dismissal should be sustained, being applied by the Civil Service Board at the time Plaintiff's appeal was heard by it, the current record before the Court contains all relevant, pertinent information and facts pertaining thereto. That Defendants intend to offer no additional facts, evidence or data bearing upon said issue."

This Request for Admissions was not denied and for purposes of this motion the Court assumes that all of the recitation of fact contained in plaintiff's brief and in the exhibits attached thereto, and the information contained in the personnel file mentioned above shall constitute the undisputed record upon which this case may be determined.

STATEMENT OF FACTS

The facts in this case are not in dispute and the Court finds them to be as follows:

1. The plaintiff is 41 years of age, has a Master's Degree in Rehabilitation Counseling, and was employed as a Classified Civil Service Employee of the State of Kansas, from June 23, 1958, until February 17, 1969, when she was summarily dismissed from her permanent position as Supervisor of Vocational Rehabilitation at Topeka State Hospital. Her entire employment record was before the Court in the form of the copy of the Personnel file of Lorene Thompson in the Department of Administration of the State of Kansas. Such records reflect an unblemished record with no service rating below satisfactory and a consistent pattern of increased rating to "Very Good" after the Plaintiff had completed the initial period of employment in a given position.

2. On August 1, 1968, the Plaintiff was promoted to the position of Supervisor of Vocational Rehabilitation, Topeka State Hospital. As of November 30, 1968, the Plaintiff was granted permanent status as Supervisor of Vocational Rehabilitation, Topeka State Hospital.

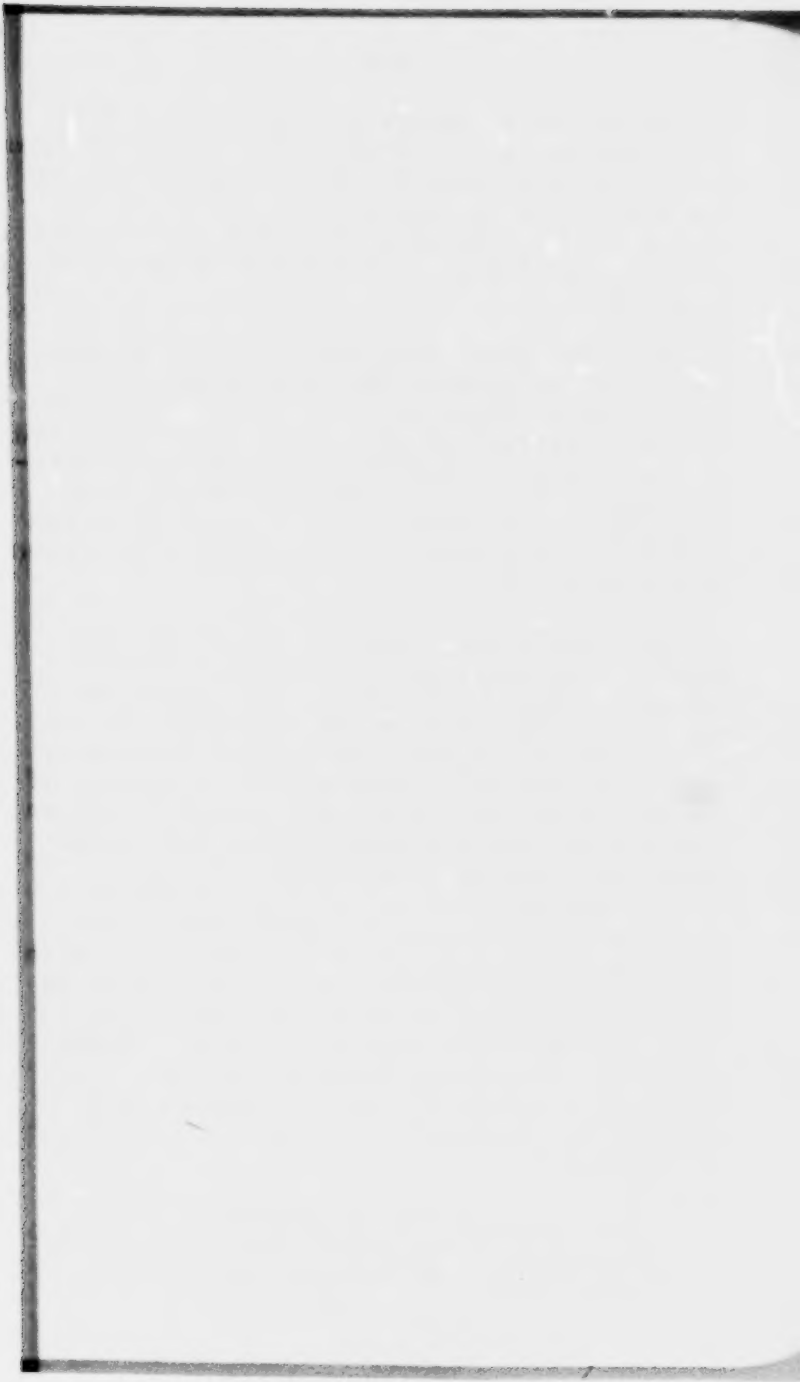
3. On February 7, 1969, Charles V. Hamm was appointed Acting Director of the Division of Vocational Rehabilitation of the State of Kansas. Charles V. Hamm first discussed with the Plaintiff the matter of her dismissal on February 17, 1969. On that date, February 17, 1969, he orally notified the Plaintiff that she was dismissed from her permanent position as Supervisor of Vocational Rehabilitation

at Topeka State Hospital, effective 5:00 P.M., February 17, 1969. The first written notice of her oral dismissal was given to the Plaintiff by the Acting Director by letter dated February 19, 1969, a copy of which is attached to Plaintiff's Petition as Exhibit "1."

4. The plaintiff gave notice of her intention to appeal her dismissal by a letter dated February 20, 1969, directed to the Chairman of the Civil Service Board of the State of Kansas, requesting a hearing before the Civil Service Board with respect to the dismissal, a copy of which letter is attached to Plaintiff's Petition as Exhibit "2."

5. The Civil Service Board of the State of Kansas, as it was then constituted, on March 27, 1969, and again on April 3, 1969, conducted hearings in the matter of the appeal of Lorene Thompson, from the action of the Acting Director of the Division of Vocational Rehabilitation dismissing the Plaintiff from her permanent position as Supervisor of Vocational Rehabilitation at Topeka State Hospital. On April 3, 1969, the Civil Service Board announced its decision with respect to the appeal, which decision is contained in the minutes of the Civil Service Board for April 3, 1969. These minutes, signed by Lloyd M. Kagey, Chairman, George C. Amis, member, and Willard W. Wallace, Jr., member, read as follows:

> "The Hearing for E. Lorene Thompson, Vocational Rehabilitation Supervisor, Department of Social

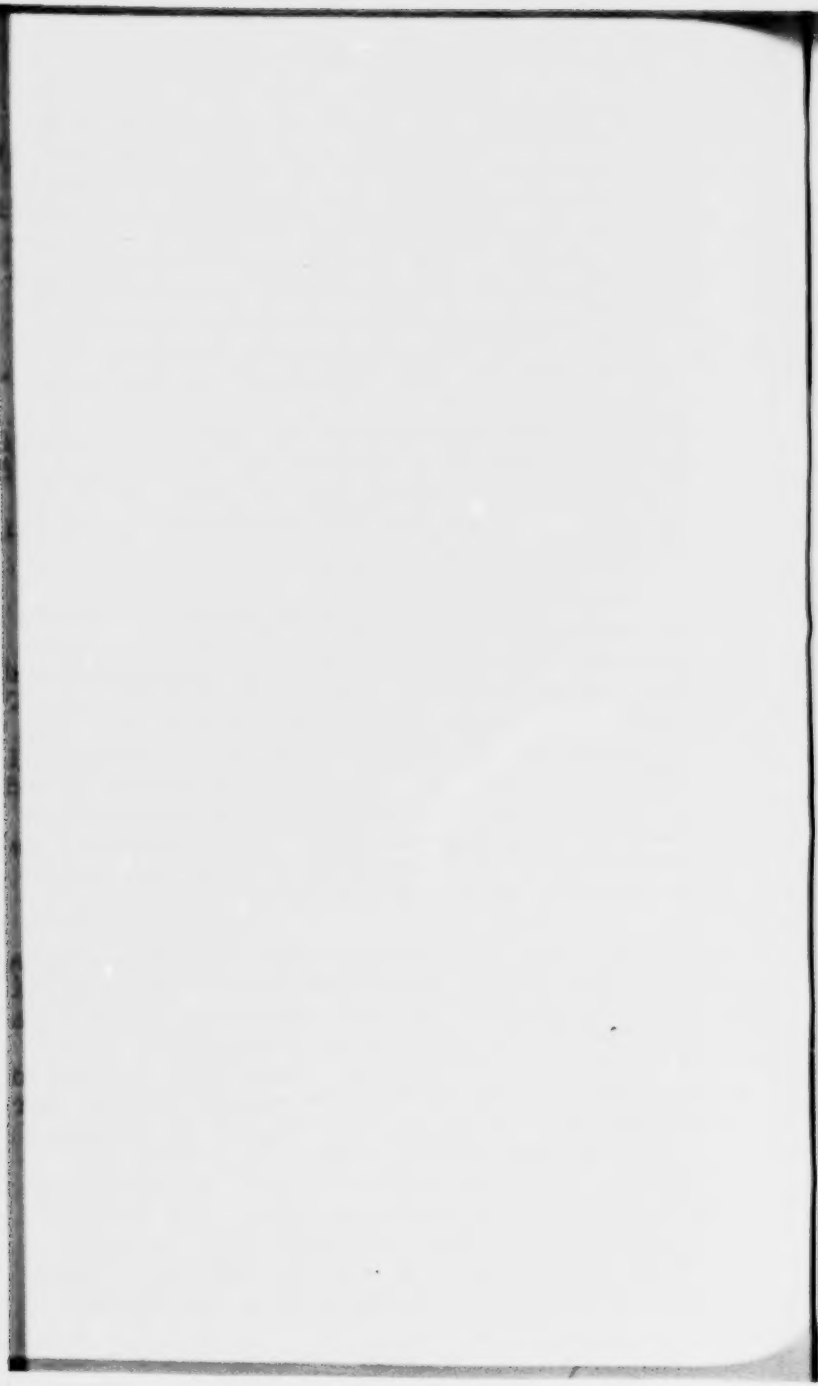


Welfare, was resumed at 10:30 A.M. At the conclusion of the hearing, it was the decision of the Board that the action of the appointing authority in dismissing Miss Thompson be sustained. The Personnel Director was directed to place the name of Miss Thompson on the eligible register for Vocational Rehabilitation Counselor for a period of one year."

6. The Secretary of the Civil Service Board directed a letter to the Plaintiff reporting its decision, a copy of which letter is attached to Plaintiff's Petition as Exhibit "24."

7. Other than the minutes referred to in Paragraph 5 above, (including the partial transcript attached thereto) and the letter marked Plaintiff's Exhibit "24", there has never been and is not now any written decision, opinion or recommendation made or filed by the Civil Service Board of the State of Kansas, with respect to Plaintiff's appeal from her dismissal as Supervisor of Vocational Rehabilitation at Topeka State Hospital.

8. At the expiration of the one year that the Board directed that the Plaintiff's name be placed on the register as a Vocataional Rehabilitation Counselor, i.e., on April 3, 1970, the Plaintiff directed and delivered to the Director of the Personnel Division of the State of Kansas, a letter requesting that her term of eligibility be extended for a period of one year in accordance with the provisions of K.S.A. 75-2942 (2) a copy of which letter is marked Exhibit "25I" and attached to Plaintiff's Petition.



9. In response to the request described in the preceding paragraph, the Secretary of the Civil Service Board directed a letter to the Plaintiff under date of April 6, 1970, a copy of which is marked Exhibit "25J" and attached to Plaintiff's Petition.

10. The Plaintiff then filed proceedings before the Civil Service Board of the State of Kansas in the nature of a "Motion for Re-Hearing and Reconsideration", a copy of which "Motion for Re-Hearing and Reconsideration" is marked Exhibit "25" and is attached to Plaintiff's Petition.

11. Plaintiff's counsel mailed a letter of transmittal, together with the original "Motion for Re-Hearing and Reconsideration" to the Secretary of the Civil Service Board, a copy of which letter is marked Exhibit "26" and is attached to Plaintiff's Petition.

12. Plaintiff's counsel mailed copies of the "Motion for Re-Hearing and Reconsideration," together with letters of transmittal to each member of the Civil Service Board and opposing counsel, a copy of which letters of transmittal are marked Exhibits "27" through "30" inclusive, and attached to Plaintiff's Petition.

13. The response and action of the Civil Service Board to Plaintiff's "Motion for Re-Hearing and Reconsideration" is reported in the minutes of the Civil Service Board for May 11, 1970, and reads as follows:

"The Board reviewed the request for re-hearing for Lorene Thompson requested by Mary Schowengerdt, attorney for Miss Thompson. It was the decision of the Board that it does not have jurisdiction over the matter."

14. The only information and notice that Plaintiff or her counsel received concerning the handling of the "Motion for Re-Hearing and Reconsideration" by the Civil Service Board are represented by a letter dated April 28, 1970, to Plaintiff's counsel from the Secretary of the Civil Service Board, a copy of which is marked Exhibit "31" and attached to Plaintiff's Petition; and the letter of May 12, 1970, to Plaintiff's counsel from the Secretary to the Civil Service Board, a copy of which is marked Exhibit "32" and attached to Plaintiff's Petition.

ISSUES TO BE DETERMINED

On the undisputed evidence the issues to be determined by the Court are as follows:

1. Was the action of the defendant State Board of Social Welfare in dismissing the plaintiff from her permanent position as a classified civil service employee without advance notice nor a specification of the charges against her and without an opportunity to be heard or present her evidence, a violation of procedural due process as required by the Constitution of the United States?

2. Was the action of the defendant State Board of Social Welfare in dismissing plaintiff from her permanent position as a classified civil service employee in violation of Kansas Department of Administration Regulations, Article 9, and therefore null and void?

3. Was the action of the defendant Civil Service Board in sustaining such dismissal unconstitutional, illegal, arbitrary, and capricious?

4. Were the actions of the defendants in violation of the statutes and regulations enacted with respect to the administration of the Civil Service Laws of the State of Kansas?

5. Is the plaintiff barred from equitable relief in this case by reason of laches or waiver?

6. To what relief, if any, is the plaintiff entitled in this action?

DECISION OF THE COURT

On the basis of the entire record in this case it is the decision of the Court and the Court finds that the plaintiff's motion for summary judgment should be sustained and that plaintiff is entitled to a judgment directing and ordering the Civil Service Board to enter an order reinstating the plaintiff as Supervisor of Vocational Rehabilitation at Topeka State Hospital and for payment to her of all salary that has been lost by reason of such dismissal and for her attorney fees and costs.

RATIONALE OF THE DECISION

In arriving at its decision in this case the Court has reasoned as follows:

This Court finds beyond question that both the spirit and letter of the civil service statutes and regulations pertaining to the dismissal of a classified civil servant have been violated by the defendants in this case. If the position of the defendants in this case is correct, then the civil service laws of Kansas and the regulations thereunder are completely ineffective to establish any semblance of a state civil service system in the State of Kansas. In arriving at this decision the following conclusions have been reached:

1. The act of the defendant State Board of Social Welfare, acting through Mr. Charles Hamm, its acting director of vocational rehabilitation, in summarily dismissing the plaintiff from her permanent position as a classified civil service employee without advance written notice specifying the grounds for dismissal and without affording her an opportunity to be heard prior to dismissal was in violation of procedural due process of law as required by the 14th Amendment to the Constitution of the United States. In reaching this conclusion the Court relies upon Olson v. Regents of University of Minnesota, 301 F. Supp. 1356, and the other cases cited in Plaintiff's brief.

2. The action of the defendant State Board of Social Welfare acting through

Charles Hamm in dismissing the plaintiff from her permanent position as a classified civil service employee was in direct violation of Kansas Department of Administration Regulations, Article 9, governing the dismissal of classified civil service employees.

K.S.A. 75-2925 declares the legislative determination to provide for a merit system for the state officers and employees in Kansas. Among other purposes it is stated that the civil service statutes provide all citizens a fair and equal opportunity for public service and to establish conditions of service which will attract employees of character and ability.

In K.S.A. 75-2935 employees of the State of Kansas are divided into unclassified and classified employees. Unclassified are those chosen by election or appointment to fill elective offices and many other employees specifically mentioned. The classified service comprises all positions not specifically excluded. This statute further states in part in Section 2 as follows:

> "No person shall be...discharged as an...employee...in the classified service in any manner or by any means other than those prescribed in this act and the rules adopted in accordance therewith."

In K.S.A. 75-2943 provision is made for probationary and permanent appointments to civil service positions. In paragraph 3 it is provided that the State Civil Service Board shall establish and

enforce rules and regulations in respect to service ratings and prescribe the extent to which such service ratings shall be considered in determining the questions of reduction or dismissal of any employees.

K.S.A. 75-2949 provides that an appointing authority may dismiss any permanent classified employee when he considers that the good of the service will be served thereby, and for disciplinary purposes may suspend without pay a permanent classified employee for a period not to exceed 30 days but no permanent employee in the classified service shall be dismissed for political, religious or racial reasons. In case of a dismissal or suspension the director shall be furnished with a statement in writing specifically setting forth the reasons for such dismissal or suspension. Upon request, a copy of such statement shall be furnished to the employee. Provision is then made for a hearing before the Board to determine the reasonableness of the dismissal.

In accordance with the provisions of K.S.A. 75-2943 heretofore discussed, regulations were adopted by the Civil Service Board pertaining to service ratings and how they should be considered in determining whether or not a civil service employee should be dismissed. In this regard Regulation 1-9-1 provides that service ratings shall be considered as a means of discovering employees who should be demoted or dismissed because of their low service value. In Regulation 1-9-2 the various appointing authorities are required to furnish service rating reports for each employee who is in the classified

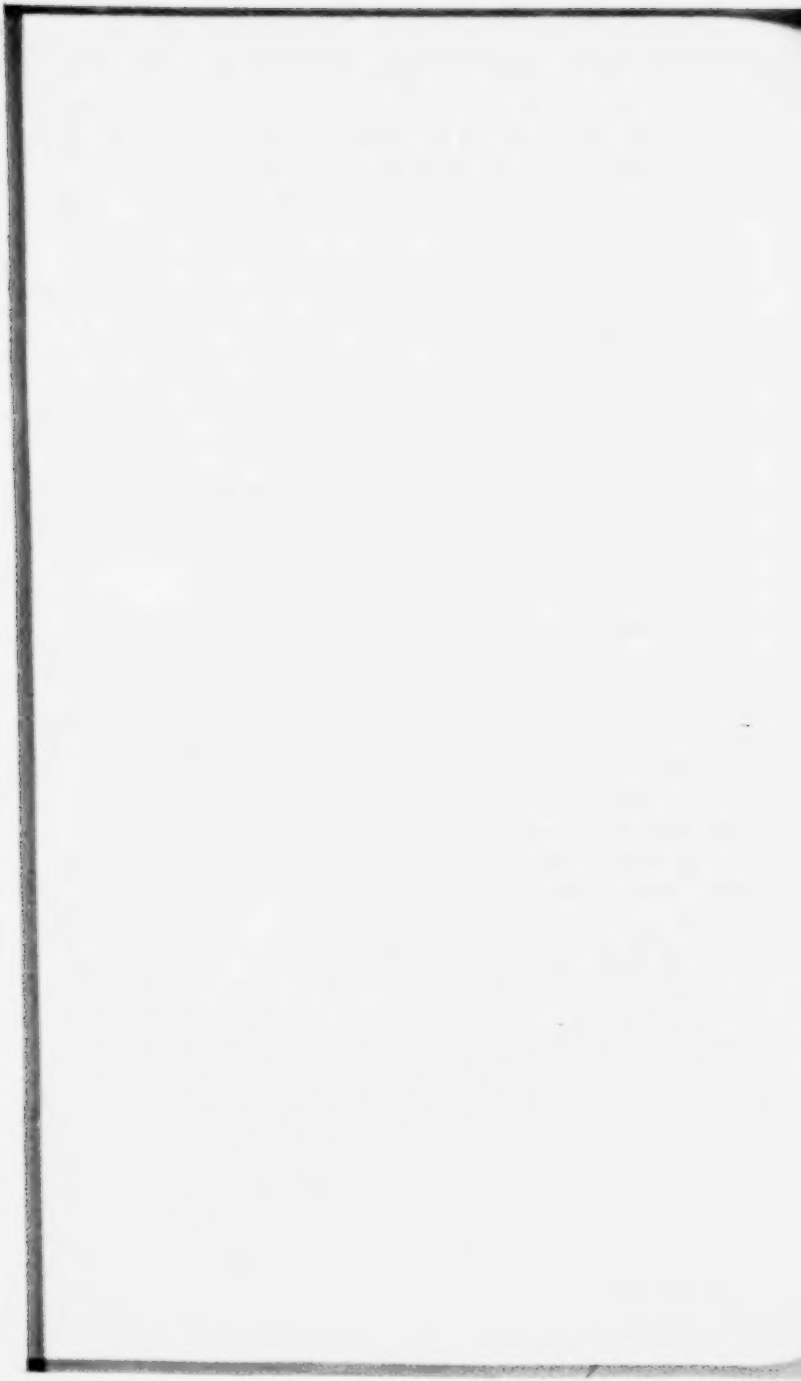
service. Each civil service employee is required to be rated by his immediate supervisor or by another qualified person designated by the appointing authority and each employee is required to be informed as to the standards on which his job performance is rated, his rating on each of these standards, and his final adjective rating. A classified employee may be rated as excellent, very good, satisfactory, fair or unsatisfactory. If an employee is rated as unsatisfactory he is to be so informed and has a right of appeal. Regulation 1-9-10 covers the subject of dismissal of an employee and the relevance and weight to be given to service ratings in connection with such dismissal. This regulation provides as follows:

> "1-9-10. Dismissal. If the service rating assigned to a permanent employee is unsatisfactory (U) and if the employee does not make sufficient improvement in his job performance so that on a supplementary service report to be made two months later his service rating is fair (F) or better, the appointing authority may consider the service rating as cause for dismissing the employee."

It should be noted that this section applies only to permanent employees and not to probationary employees. Once a civil service employee in Kansas attains his permanent employee status he is entitled to be protected under the provisions of this regulation. This is shown by Regulation 1-9-12 which declares that if the

service rating assigned to a probationary employee at the end of his probationary period is fair or unsatisfactory, he may not be granted permanent status. What all these statutes and regulations mean is simply this: The question of dismissal of a permanent civil service employee is to be determined by his record over the long pull and not by a fit of pique or some temporary disagreement which might arise in the course of his work. Permanent civil service employees in Kansas are to be rated in accordance with the regulations periodically and if rated unsatisfactory, the appointing authority may consider the service rating as a cause for dismissing the employee. On occasions, of course, a situation may arise where the permanent civil service employee is guilty of dishonesty, moral turpitude, conviction of a crime or other severe infractions justifying summary action. This position is taken by the civil service board in the case involving Violet Cowan where the following statement was made in its decision by the Civil Service Board:

> "Unless the Appointing Authority shall allege and prove, that the employee is guilty of dishonesty, moral turpitude, conviction of a crime or other severe infractions justifying summary actions, it is fatal to the cause of the appointing authority, if it is shown that such appointing authority failed to:
>
> 1. Follow any statutory requirements, or;



2. Follow the rules and regulations of the Department of Administration, or;

3. Follow the published rules and policies that that particular appointing authority may have published and distributed to its personnel."

In the Cowan case the Civil Service Board held that the Board of Probation and Parole had disregarded and not followed regulation 1-9-10 just mentioned pertaining to dismissal and that the civil service employee Violet M. Cowan was entitled to be reinstated with back pay.

Counsel for the defendants argues that under the provisions of K.S.A. 75-2949 the appointing authority may dismiss any permanent classified employee when he considers that the good of the service will be served thereby. It is obvious to this Court that this section should be read in light of the other statutes pertaining to civil service and that an appointing authority cannot summarily, without just cause and without following the prescribed rules and regulations and procedures of the civil service board dismiss a permanent classified civil service employee without complying with the specific regulations established by the Civil Service Board.

It is clear from Regulation 1-9-10 that not only must an unsatisfactory rating be assigned to a permanent employee in order to be a cause for dismissal, but that regulation also requires that the employee be given an opportunity to make sufficient improvement in his job performance so that on a supplementary service report to be made two months later

his service rating is raised to fair or better. As pointed out heretofore plaintiff Lorene Thompson never had an unsatisfactory rating prior to her dismissal and in fact in a period of almost eleven years she had never received a service rating below satisfactory and had consistently received a rating of very good. Regulation 1-9-10 clearly required that she be given an opportunity to improve her job performance before she could be dismissed for unsatisfactory job performance.

One other matter should be noted. The ultimate decision of the Civil Service Board, although sustaining the dismissal of Miss Thompson, directed the Personnel Director to place her name on the eligible register as a Vocational Rehabilitation Counselor for a period of one year. This obviously is a finding that she was qualified as a vocational rehabilitation counselor. Turning again to the regulations it is noted that Regulation 1-9-9 pertains to the subject of a demotion of a permanent employee. This section provides that the appointing authority may consider the rating as cause for recommending to the director that an employee be demoted to another position in a lower class if for two consecutive rating periods the rating given the employee is below satisfactory. As a matter of fact the plaintiff Lorene Thompson received a rating dated November 30, 1968, in which she was rated as satisfactory. In fact on August 1, 1968, she was promoted to the position of supervisor and as of November 30, 1968, was granted permanent status as supervisor of vocational rehabilitation at

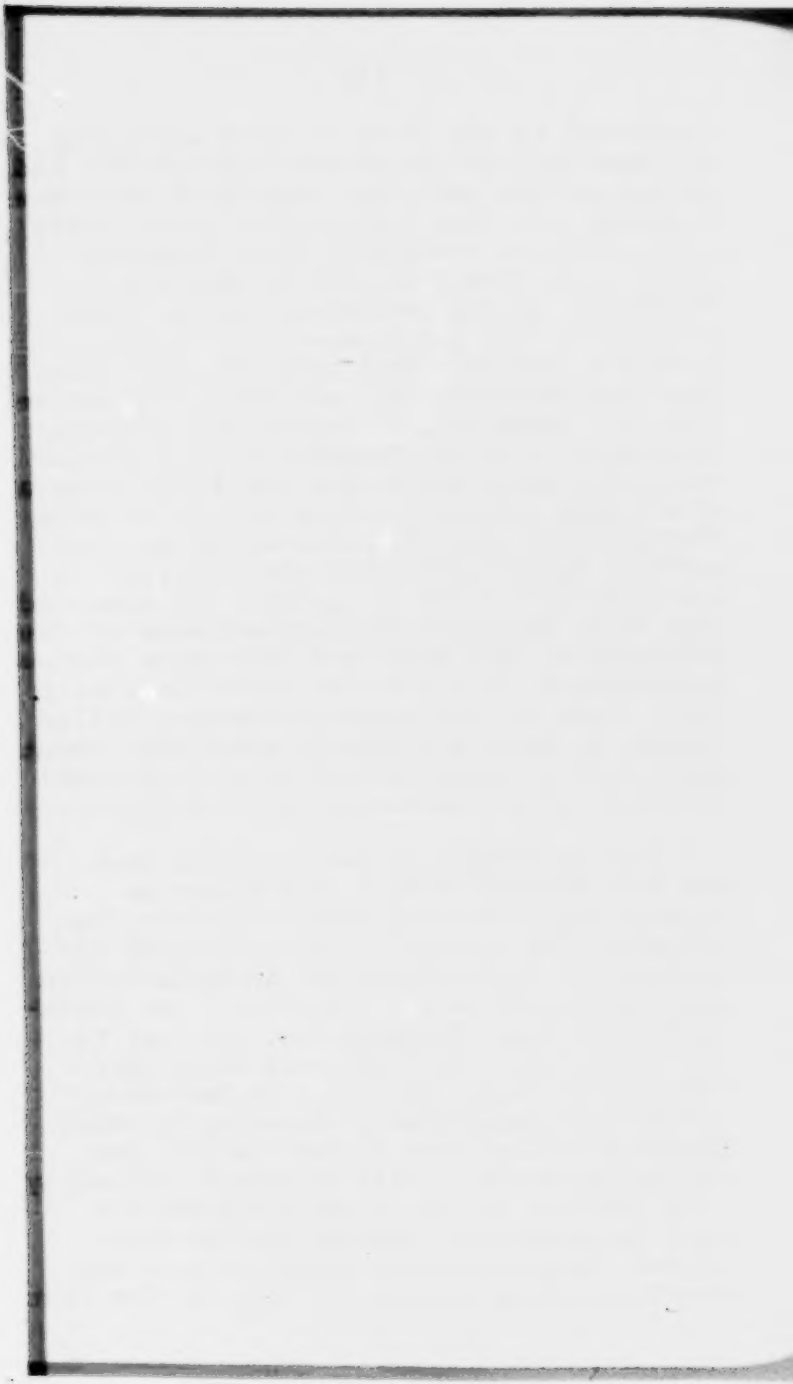
Topeka State Hospital. Clearly there was no compliance with this section when she was summarily discharged on February 17, 1969.

3. The evidence presented at the hearing before the Civil Service Board clearly could not justify a summary dismissal of plaintiff from her classified civil service position where there was no compliance with the appropriate civil service regulations discussed in the previous section. As pointed out in the statement of facts and as contained in the record, the plaintiff has a Masters Degree in Rehabilitation Counseling and was employed continuously in that field from June 23, 1958, until she was summarily dismissed on February 17, 1969. At no time during this eleven years did she ever receive a service rating below satisfactory, and as a matter of fact received a rating of very good for most rating periods. The testimony was undisputed that on November 30, 1968, only two and a half months before her summary dismissal she was granted permanent status as supervisor of vocational rehabilitation at Topeka State Hospital. The evidence presented at the hearing before the Civil Service Board is summarized in Miss Schowengerdt's letter to Dr. Harder dated October 16, 1969. It is clear that all of the persons in positions of major administrative responsibility at Topeka State Hospital testified in favor of plaintiff. For example, Dr. William Simpson, Clinical Director at Topeka State Hospital testified that she was a valuable and capable employee, that she had been accorded the position of department head within the

Topeka State Hospital Administrative structure and that if she had been an employee of the Topeka State Hospital, she would not have been fired. Dr. Catherine Rainbow, Assistant Chief of the Biddle Section, stated that she had great confidence in the plaintiff and her work. Dr. Robert Proctor of the Psychology Department of the Biddle Section testified that he had a great deal of respect for Miss Thompson's professional ability and performance. Miss Lorraine Galle, Social Work Supervisor in the Biddle Section, testified that she had ample opportunity to observe Miss Thompson's professional performance and although she was a perfectionist, that it was for the benefit of the patients. Miss Peggy Porter, Social Work Supervisor in the Eastman Section, testified that she had known Miss Thompson since about 1963 and worked closely with her on individual cases and had always had good experiences in relation to them. It was her judgment that Lorene Thompson was by far the ablest vocational rehabilitation person she had worked with and would welcome working with her either as a counselor or a supervisor. Other witnesses from Topeka State Hospital testified substantially to the same effect. Not a single one of the vocational rehabilitation counselors at the hospital who worked with Miss Thompson at the hospital were called as witnesses and no one in authority at Topeka State Hospital was asked to testify on behalf of the appointing authority. There was some reference to two counselors who were no longer employed at the hospital who apparently did not get along with Miss Thompson but this testimony was not

presented in the form of live witnesses. Mr. Hamm called three secretaries who had worked in the unit who testified that Miss Thompson was very particular about their work, that on occasions Miss Thompson would call down the hall to get the attention of the secretary rather than getting up and going down to the secretary's office. The only witness other than the secretaries, who were not counselors that Mr. Hamm called having any personal knowledge of Miss Thompson's performance was a Mr. Matt Smith who had first been a vocational rehabilitation client of Miss Thompson and who then served as an independent contractor with the hospital to train patients how to paint. It appeared that Miss Thompson criticized some of the painting he had done and that Miss Thompson had engaged in a hostile conference with him. None of the other witnesses called seemed to have any direct knowledge about plaintiff's capabilities as a vocational rehabilitation counselor or supervisor.

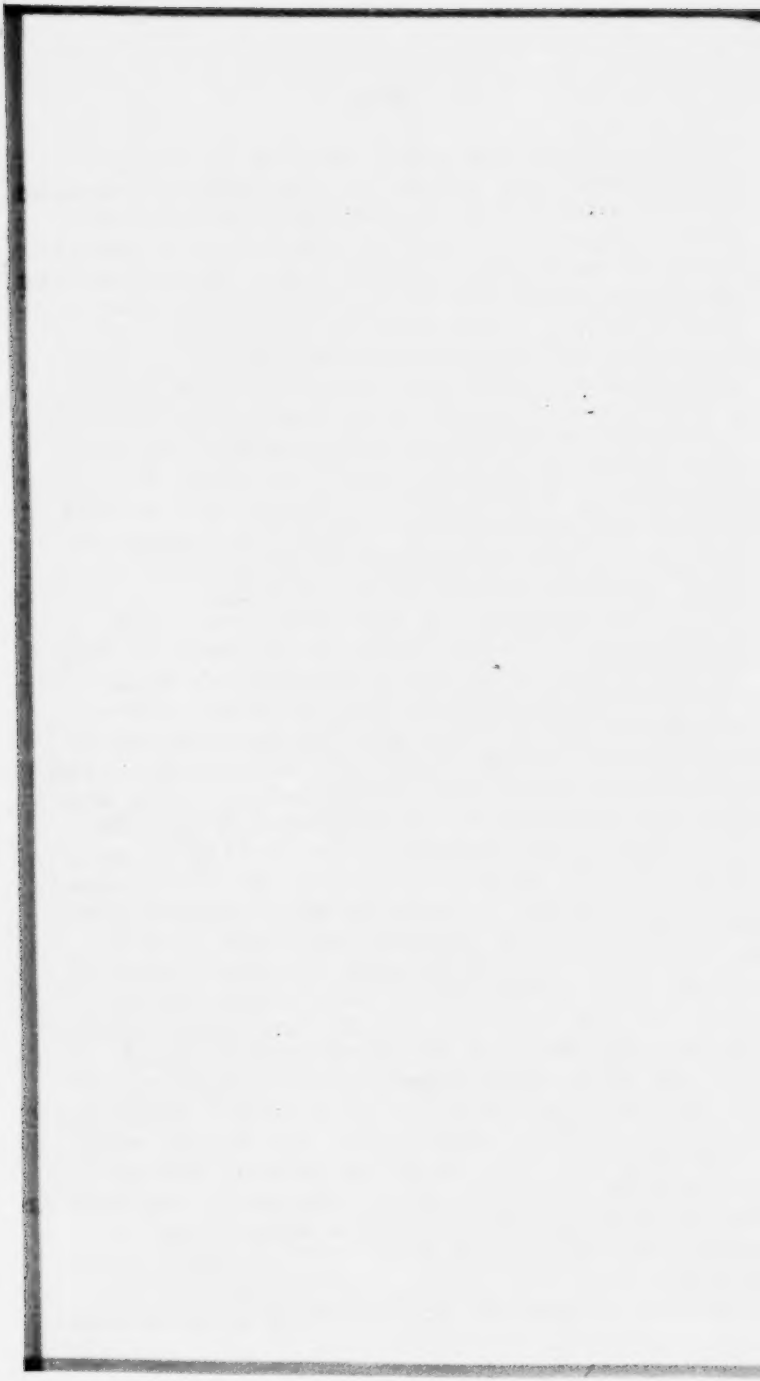
The principal witness relied upon was Mr. Charles Hamm himself who as appointing authority gave testimony describing the manner in which he had investigated the vocational rehabilitation unit at Topeka State Hospital. He testified that Miss Thompson had reacted to his oral order of dismissal in a very strong and vocal manner. He had never served in a supervisory capacity to Miss Thompson except for investigation and firing purposes. Miss Thompson obviously took umbrage at Mr. Hamm's suggestion that he summarily remove her as vocational rehabilitation supervisor. Her reaction seems normal in view of the fact



that no attempt was made to comply with the clear regulations and procedures established by the Civil Service Board. This Court has concluded that from the evidence presented at the hearing there is nothing whatsoever in the record to disclose any neglect of official duties, any act of dishonesty, moral turpitude, or any other misconduct justifying the summary action that was taken in this case. Certainly there is no justification for the failure of either the appointing authority or the Civil Service Board to require that existing regulations established for the protection of the civil service system be complied with. This was an illegal, arbitrary and capricious action.

4. In their brief presented in this case the defendants really raise no defense to the merits of any of the grounds contained in the plaintiff's brief. The contention of the defendants is that the plaintiff should be denied relief because of her laches in bringing the instant action in mandamus over one year after the decision of the Civil Service Board. Defendants contend that the plaintiff should be denied any equitable relief because her cause is tainted by laches. The only trouble in this case is that the record shows that the plaintiff was treated in an extremely shabby manner and given the run around because of the nature of the decision of the Civil Service Board. The Civil Service Board in its ruling sustained the dismissal <u>but ordered that she be restored to the eligible list as a qualified vocational rehabilitation counselor</u>. This Court agrees with the position of plaintiff's

counsel that the very nature of this ruling was the cause of the course pursued by the plaintiff during the following year. She was clearly placed in a position of walking a tight rope, doing on the one hand what would be reasonably and legitimately expected to effectuate a mutually satisfactory resolution of the problems through the usual proper administrative channels but on the other hand to protect and preserve her rights, if such negotiations should fail, to seek legal redress in the courts. Plaintiff sought advise of counsel. It was her judgment and it is the judgment of this Court that the action of the Civil Service Board in sustaining her dismissal and directing that her name be placed on the eligible register as a qualified rehabilitation counselor was a clear confirmation as to her qualifications as a vocational rehabilitation counselor. The Board was in effect going along with the obvious intention to demote and not to fire her. Her attempts to obtain a reconciliation with the agency as vocational rehabilitation counselor was understandable when it is considered that there is little work in Kansas in the field of vocational rehabilitation except as a part of the operations of the Department of Social Welfare or agencies closely allied with that department. Plaintiff wrote various letters to various administrators in the Department of Social Welfare and was not able to obtain relief. It became obvious after the year expired in which she was denied work that from a practical point of view her summary dismissal from her civil service position had the effect of permanently precluding



her from carrying out her profession in the state. To find laches the Court must find that there was an unreasonable and undue or unexplained delay on the part of the plaintiff in filing a case in court to protect her rights. The burden of proving this is on the defendants, which in the opinion of this Court has not been sustained in the record. Defendants have suffered no real change of position and the Court has concluded that laches cannot be asserted as a defense in the case.

5. The Court has also concluded that waiver is not a defense to the case at bar. At no time did she intend to waive her rights and having waited a reasonable time to obtain relief under administrative procedures her only remedy was to resort to the courts. In order to have a valid waiver there must be an intentional relinquishment of a known right. Such a waiver is not sustained under the record in this case.

6. On the entire record in this case and based upon the findings of fact and conclusions of law heretofore presented in this memorandum opinion, the plaintiff is entitled to summary judgment in this case, and is entitled to be reinstated to her position as vocational rehabilitation supervisor. She is entitled to have restored to her the back pay which she would have received had she not been illegally dismissed from her position in violation of the express regulations of the Civil Service Board. Plaintiff is also entitled to recover the costs of this action including reasonable attorney fees. This Court leaves the matter of the amount of back pay and

attorney fees open and by this opinion directs counsel for the plaintiff to file a motion for determination of back pay and appropriate attorney fees. In a hearing on that motion the Court will conduct an evidentiary hearing to determine those issues.

The judgment in this case as set forth heretofore shall not be effective until all issues have been determined and an appropriate journal entry is prepared by plaintiff's counsel. For purposes of post judgment motions the time for the filing of the same shall commence to run as of the date a signed journal entry is filed with the clerk.

Dated this 14 day of December, 1970.

S/David Prager
David Prager
District Judge
Fourth Division

APPENDIX E

IN THE DISTRICT COURT
OF SHAWNEE COUNTY, KANSAS
Fourth Division

No. 113,185

LORENE THOMPSON, Plaintiff,

v.

GEORGE C. AMIS, HENRY J. RIOJAS, THEODORE K. SHARP, as members of the Civil Service Board of Kansas; and GEORGE C. AMIS, HENRY J. RIOJAS, and THEODORE K. SHARP, individually; and WALTER F. KUIKEN, Secretary of the Civil Service Board of Kansas; and WALTER F. KUIKEN, individually; and the DEPARTMENT OF ADMINISTRATION of the State of Kansas; and the STATE BOARD OF SOCIAL WELFARE OF THE State of Kansas, Defendants.

SUPPLEMENTARY MEMORANDUM DECISION

On December 14, 1970, this Court filed a memorandum decision determining certain issues in this case. Subsequent to that time the defendants filed a motion for rehearing contending that they were not afforded an opportunity to submit evidence in the case. The files in this case disclose that the defendants did not deny certain requests for admissions under oath. However, in order to be certain

that all rights were protected a rehearing was granted on January 15, 1971, and the defendants were allowed time to furnish additional evidence. Thereafter the defendants filed with the Court a transcript of a hearing before the Civil Service Board held on March 27, 1969, and April 3, 1969. Defendants stated that they did not wish to offer any evidence additional to that contained in the transcript and submitted the case to the Court on the record before the Court including the transcripts. Counsel then filed written briefs supplementary to those previously filed and commenting on the evidence contained in the transcript. The Court has carefully reviewed the entire file in the case, including the transcripts of the testimony before the Civil Service Board and the matter is now ready for decision.

On the basis of the entire record the Court adopts its memorandum decision filed in this case on December 14, 1970. In addition to that memorandum decision the Court files this supplementary decision in order to comment on the evidentiary record presented in the transcript which was admitted into evidence. In this regard it is clear that a thorough examination of the transcript presented not only supports but buttresses and fortifies the previous memorandum decision in this case. As pointed out heretofore the plaintiff was employed as a classified civil service employee of the State of Kansas from June 23, 1958, until she was dismissed on February 17, 1969. Her employment record which is in the form

of a copy of the personnel file from the Department of Administration of the State of Kansas reflects an unblemished record with no service rating below "satisfactory" and a consistent pattern of increased rating to "very good" after the plaintiff had completed the initial period of employment in a given position. The evidentiary matters as disclosed by the transcript of the evidence before the Civil Service Board lead the Court to additional comments and conclusions:

1. The plaintiff Lorene Thompson in her work at Topeka State Hospital was competent, intelligent, and had a thorough familiarity with the vocational rehabilitation services. She had the respect of other department directors and section chiefs within Topeka State Hospital. (Tr. 28) This is admitted and conceded by the State at this hearing. (Tr. 29 and 58)

2. In her work at the State Hospital Miss Thompson had a personal conflict with Mr. Galbreath and Mrs. Nixon, who were counselors under her supervision. It seems to be undisputed that they were not good employees and were not retained in the department by Mr. Hamm subsequent to his becoming Director of Vocational Rehabilitation. (Tr. pages 37, 42, 50, 105, 133 to 134, 147, 272, and 293.)

3. Mr. Pribyl who was Director of Vocational Rehabilitation prior to Mr. Hamm was fired for reasons not specified. The inference is that he had operated the department beyond the financial resources of its budget. (Tr. 277) Dr.

Simpson testified, "His past got up with him." (Tr. 34).

4. Plaintiff had successfully completed her mission of establishing a vocational rehabilitation program at Topeka State Hospital and all of the administrators at Topeka State Hospital without exception praised her work. These included Dr. William Simpson, Clinical Director (Tr. 28 and 42); Dr. James Horne (Tr. 51-52); Dr. Kathryn Rainbow (Tr. 56-66); Dr. Robert Proctor (Tr. 67-78); Lorraine Galle and Margaret Porter.

5. With the exception of the two trouble makers, Galbreath and Nixon, the other vocational rehabilitation counselors praised Miss Thompson's work as supervisor and held her in high regard. These included A. J. Davis and Christie Ransom.

6. The hearing conducted by Charles Hamm was grossly unfair and failed to satisfy the minimum standards of due process of law for the following reasons:

a. Mr. Hamm as attorney for the State Department of Social Welfare had previously been working with his predecessor Mr. Pribyl to gather evidence to sustain plaintiff's dismissal before the Board. He specifically and categorically admitted this. (Tr. 263) It is inconceivable that he could have given plaintiff a fair hearing later when he became the Director.

b. Prior to her dismissal the plaintiff was never given notice in writing of the specific ground or grounds for her

dismissal nor the nature of the evidence to support such charges.

c. The plaintiff was never afforded a reasonable opportunity to present evidence on her behalf prior to her dismissal.

d. The plaintiff was given the "Hobson's choice" by Mr. Hamm to either accept demotion forthwith or be dismissed from the civil service. (Tr. 352 and 353) She would not accept demotion and he instantaneously fired her. Beyond question this denied her a right to a fair hearing as a civil servant and was a denial of due process of law.

7. The hearing conducted before the Civil Service Board was patently unfair for the reason that Charles Hamm, as Director of Vocational Rehabilitation, was the appellee in the case and was also the chief witness against the plaintiff and also served as attorney for himself and the State Department of Social Welfare, in which position he cross-examined witnesses, made trial objections and presented argument to the Board. This was a gross violation of the canons of professional ethics. By appearing as the principal witness Mr. Hamm placed his credibility in issue as well as his judgment in dismissing Miss Thompson. This placed the Civil Service Board in the position of having to judge Mr. Hamm's credibility and his judgment and at the same time giving him their ear as counsel for the presentation of arguments. In this regard the Board was placed in a completely intolerable position which was not only unfair to Miss Thompson but also grossly unfair to the Board itself.

In this regard see the specific provisions of 1969 Code of Professional Responsibility Canon 5, ED 5-9.

8. The testimony against plaintiff disclosed no evidence whatsoever of dishonesty, moral turpitude, conviction of crime or other gross misconduct justifying her dismissal from the civil service without hearing and without compliance with the statutes and regulations discussed in the Court's original memorandum decision. The testimony presented against plaintiff at the hearing was restricted to the following:

a. There was a conflict in her division at Topeka State Hospital resulting from a clash between plaintiff and two of her counselors. These two counselors Galbreath and Nixon were beyond dispute undesirable employees and the administrators of the hospital urged their prompt discharge.

b. In July 1967 Miss Thompson became angry when she was not appointed as supervisor instead of William Baker. She remarked that Mr. Pribyl was unqualified for the job of Director of Vocational Rehabilitation. In spite of this, the witness William Baker recognized her ability and made what he stated was an honest evaluation of Miss Thompson's job performance for the period January 5, 1967, to January 4, 1968, giving her a rating of very good and classifying her as a willing team worker, seldom subject to criticism and that she maintains normal relations with others. (Exhibit 12 [9] in plaintiff's personnel file.) This witness had no direct knowledge of plaintiff's work at Topeka State Hospital. (Tr. 86)

c. Plaintiff was a perfectionist for herself and others, and was demanding of her secretaries. On occasions she would raise her voice in calling a secretary from another office. On occasions she would get upset with her secretaries and they would complain about it. So testified Catherine Chambers, Janet Gillespie, Lazette Randel, Irene Harrison and Joan Flott. In spite of this testimony it is clear that plaintiff was never at any time graded unfavorably for her relationship with others. This personality weakness did not seriously affect her rating on her various civil service positions. Certainly the good of the service would not justify dismissal on this ground without giving her an opportunity to correct these complaints.

d. Mr. Hamm testified about his discussions with persons in Kansas City where Miss Thompson worked for the county social welfare department in 1963. No witnesses appeared to testify about this situation. Plaintiff had no opportunity to cross-examine witnesses or to rebut this testimony. The plaintiff was employed for many years after this situation arose with satisfactory ratings from her immediate superiors. Certainly this evidence would not justify her dismissal in the instant situation.

e. The other evidence presented was of little if any probative value on the issue of plaintiff's alleged misconduct at Topeka State Hospital as the basis for her discharge.

Any court is always loathe to interfere with the actions of administrative boards and tribunals. This is especially

true in matters involving the employment or dismissal of public employees. However, a court has a duty to act where substantial rights have clearly been violated. It may be stated as a general principle that whenever a governmental body or boards of any kind acts so as to affect substantial rights of an individual citizen the Constitution of the United States requires that the act be consonant with due process of law. The minimum procedural requirements necessary to satisfy due process of law depend upon the circumstances and the interests of the parties involved. In order to determine whether or not due process of law has been satisfied the precise nature of the citizen's interest that has been adversly affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the governmental agent whose conduct is challenged, the balance of hurt complained of and the good to be accomplished are some of the considerations that must enter into the judicial judgment. Reduced to its essence due process of law simply means that every citizen, whether a public employee, student, or in some other capacity, is entitled to be treated with fairness under all the facts and circumstances. The test in every case should be: Was the citizen treated fairly considering the rights of all persons involved? It would appear to the Court that before a classified civil servant in Kansas can be dismissed from her permanent civil service position due process of law requires three minimum requirements. They are the following:

(1) The civil servant should be given adequate notice in writing of the specific ground or grounds and the nature of the evidence on which the dismissal is to be based.

(2) The civil servant should be given an opportunity for a fair hearing before an unprejudiced hearing officer in which he is provided a fair opportunity for presenting his position, explanations, and evidence.

(3) A civil servant should not be dismissed or be subjected to disciplinary action which is not supported by any substantial evidence.

As pointed out in the original memorandum decision this Court has concluded that the act of the defendant State Board of Social Welfare, acting through Mr. Charles Hamm, its acting Director of Vocational Rehabilitation, in summarily dismissing the plaintiff from her permanent position as a classified civil service employee without advance written notice specifying the grounds for dismissal and without affording her an opportunity to be heard prior to dismissal was in violation of procedural due process of law as required by the 14th Amendment to the Constitution of the United States. This position is clearly supported by Olson v. Regents of University of Minnesota, 301 F. Supp. 1356 and the other cases cited in plaintiff's brief.

The Court finds that under the entire record now before the Court the action of defendant State Board of Social Welfare,

acting through Charles Hamm, in dismissing plaintiff from her permanent position as a classified civil service employee was in direct violation of Kansas Department of Administration Regulations, Article 9, governing the dismissal of classified civil service employees. The rationale behind this conclusion is clearly set forth in the original memorandum opinion of the Court. For this reason the Court has concluded that the plaintiff is entitled to judgment in this case on her petition and is entitled to be reinstated to her position as vocational rehabilitation supervisor. The judgment in this case for purposes of post judgment motions shall not be effective until all issues have been determined and an appropriate journal entry is prepared by plaintiff's counsel. In accordance with the direction of the Court in the original memorandum decision the plaintiff has filed a motion for determination of back pay and attorney fees. It is the order of the Court that an additional pretrial conference be held after the call of the motion docket on Friday, March 12, at which time Court and counsel will explore the remaining issues in this case and the scope of the evidence to be presented in support of the parties' positions.

Dated this 18 day of February, 1971.

S/David Prager
David Prager
District Judge
Fourth Division

APPENDIX F

IN THE DISTRICT COURT
OF SHAWNEE COUNTY, KANSAS
Fourth Division

No. 113,185

LORENE THOMPSON, Plaintiff,

v.

GEORGE C. AMIS, HENRY J. RIOJAS, THEODORE K. SHARP, as members of the Civil Service Board of Kansas; and GEORGE C. AMIS, HENRY J. RIOJAS, and THEODORE K. SHARP, individually; and WALTER F. KUIKEN, Secretary of the Civil Service Board of Kansas; and WALTER F. KUIKEN, individually; and the DEPARTMENT OF ADMINISTRATION of the State of Kansas; and the STATE BOARD OF SOCIAL WELFARE of the State of Kansas,

Defendants.

MEMORANDUM DECISION

On April 23, 1971, a hearing was held in this case on the issue of damages and attorney fees. All parties were allowed an opportunity to present evidence in the case. The matter was then taken under advisement on briefs to be submitted by counsel. Briefs have been received from counsel, the last of which was delivered to the Court on May 17, 1971. The Court has carefully considered the record in this case along with the briefs and arguments of counsel and the matter is now ready for decision.

The Court has concluded that the plaintiff is entitled to be reinstated to her position as Vocational Rehabilitation Supervisor with the State Department of Social Welfare. The reasons for this conclusion are contained in the memorandum decision dated December 14, 1970, and supplementary memorandum decision dated February 18, 1971. The Court has found that plaintiff was denied due process of law both constitutional and statutory in the manner in which she was summarily removed from her permanent position as a classified civil service employee.

Under these circumstances the decisions recognize that the aggrieved civil service employee is entitled not only to be restored to her position but also to be reimbursed for her full salary which she has lost as a result of her wrongful dismissal. The problem presented in this case concerns the elements of damage to be considered by the Court in determining what proper reimbursement for loss of salary should be.

Counsel for plaintiff has calculated the loss of salary. The Court has concluded that plaintiff is entitled to her regular salary which she was making at the time of her dismissal plus any regular across the board increases which she would have received had she been continued in her position. In addition thereto she should have restored to her her social security and retirement benefits. The right to restoration of retirement benefits has been recognized in Mass v. Board of Education, 61 Cal. 2nd 612, 394 P2nd 579. The Court has concluded

the plaintiff should not be provided any merit increases since this is speculative and she may or may not have received such merit increases. The Court has also concluded that she is not entitled to any vacation or sick leave since she has been on an enforced vacation since February 17, 1969, the date of her dismissal.

Plaintiff is entitled to interest on the salary which she has not received. This is a matter of mathematical calculation.

The Court has also concluded that a date should be set for her return to work. It is the judgment and order of the Court that the plaintiff be restored to her position as of July 1, 1971, at which time her regular salary should be paid to her. Upon returning to work her damages in this case for back salary will be concluded.

The defendants have raised the issue of mitigation of damages. The burden is upon the defendants to plead and prove any mitigation of damages by reason of the fact the plaintiff might with reasonable diligence have obtained suitable employment elsewhere during the period of her enforced absence from work. On the basis of the record before the Court the Court finds that the defendants have not sustained the burden of proof and that during the period she has been off work, the plaintiff has diligently sought employment in her field. Since the burden of proof on this issue has not been sustained the Court finds that there should be no deduction from plaintiff's damages

as a result of her failure to mitigate her damages.

The matter of attorney fees has caused this Court a great deal of concern. The Court has finally concluded that attorney fees should not be allowed in this case. It should be noted that in its essence this is not really a mandamus proceeding; no alternative or peremptory writ of mandamus was issued. Normally damages including attorney fees are allowed where following issuance of a writ of mandamus the defendants have refused to comply with the writ. This entire proceeding has been in the nature of a proceeding in equity for injunctive relief and declaratory judgment to determine whether the acts of the defendants were in violation of law in the manner in which plaintiff was discharged from her civil service position. There are some legal points involved in this case which are difficult and of first impression and under all of the facts and circumstances in this case the Court has concluded that attorney fees should not properly be allowed. Attorney fees are therefore denied to the plaintiff.

Counsel for the plaintiff is requested to prepare an appropriate journal entry in accordance with this memorandum decision, calculating the total damages recoverable by the plaintiff through June 30, 1971. The journal entry should also contain an order requiring defendants to reinstate plaintiff in her classified civil service position as Vocational Rehabilitation Supervisor as of July 1, 1971. For purposes of post trial proceedings a judgment in this case shall become final and effective as of the filing of an appropriate

signed journal entry with the clerk of this court.

Dated this 24 day of June, 1971.

S/David Prager
David Prager
District Judge
Fourth Division

APPENDIX G

IN THE DISTRICT COURT
OF SHAWNEE COUNTY, KANSAS
Fourth Division

No. 113,185

LORENE THOMPSON, Plaintiff,)
)
v.)
)
GEORGE C. AMIS, HENRY J. RIOJAS,)
THEODORE K. SHARP, as members of)
the Civil Service Board of Kansas;)
and GEORGE C. AMIS, HENRY J. RIOJAS,)
and THEODORE K. SHARP, individually;)
and WALTER F. KUIKEN, Secretary of)
the Civil Service Board of Kansas;)
and WALTER F. KUIKEN, individually;)
and the DEPARTMENT OF ADMINISTRATION)
of the State of Kansas; and the STATE)
BOARD OF SOCIAL WELFARE of the State)
of Kansas,)
Defendants.)

ORDER OF SUMMARY JUDGMENT

Now, on the 23rd day of October, 1970, comes on for hearing plaintiff's motion for summary judgment, plaintiff appearing by Mary Schowengerdt of Irwin, Irwin & Schowengerdt, her attorneys; the State Board of Social Welfare appearing by its attorney, Woody D. Smith; the Civil Service Board of the State of Kansas, and the Department of Administration of the State of Kansas appearing by Robert E. Hoffman, their attorney. Thereupon, oral arguments are presented to the Court, written briefs

were provided by the parties and the motion submitted to the Court.

Now, on this 14th day of December, 1970, the Court enters its Memorandum Decision in which it makes the following findings of fact:

1. The Plaintiff is 41 years of age, has a Master's Degree in Rehabilitation Counseling, and was employed as a Classified Civil Service Employee of the State of Kansas, from June 23, 1958, until February 17, 1969, when she was summarily dismissed from her permanent position as Supervisor of Vocational Rehabilitation at Topeka State Hospital. Her entire employment record is before the Court in the form of the copy of the Personnel file of Lorene Thompson in the Department of Administration of the State of Kansas. Such records reflect an unblemished record with no service rating below satisfactory and a consistent pattern of increased rating to "Very Good" after the Plaintiff had completed the initial period of employment in a given position.

2. On August 1, 1968, the Plaintiff was promoted to the position of Supervisor of Vocational Rehabilitation, Topeka State Hospital. As of November 30, 1968, the Plaintiff was granted permanent status as Supervisor of Vocational Rehabilitation, Topeka State Hospital.

3. On February 7, 1969, Charles V. Hamm was appointed Acting Director of the Division of Vocational Rehabilitation of the State of Kansas. Charles V. Hamm first discussed with the Plaintiff the matter of

her dismissal on February 17, 1969. On that date, February 17, 1969, he orally notified the Plaintiff that she was dismissed from her permanent position as Supervisor of Vocational Rehabilitation at Topeka State Hospital, effective 5:00 P.M., February 17, 1969. The first written notice of her oral dismissal was given to the Plaintiff by the Acting Director by letter dated February 19, 1969, a copy of which is attached to Plaintiff's Petition as Exhibit "1."

4. The Plaintiff gave notice of her intention to appeal her dismissal by a letter dated February 20, 1969, directed to the Chairman of the Civil Service Board of the State of Kansas, requesting a hearing before the Civil Service Board with respect to the dismissal, a copy of which letter is attached to Plaintiff's Petition as Exhibit "2."

5. The Civil Service Board of the State of Kansas, as it was then constituted, on March 27, 1969, and again on April 3, 1969, conducted hearings in the matter of the appeal of Lorene Thompson, from the action of the Acting Director of the Division of Vocational Rehabilitation dismissing the Plaintiff from her permanent position as Supervisor of Vocational Rehabilitation at Topeka State Hospital. On April 3, 1969, the Civil Service Board announced its decision with respect to the appeal, which decision is contained in the minutes of the Civil Service Board for April 3, 1969. These minutes, signed by Lloyd M. Kagey, Chairman, George C. Amis, member and Willard W. Wallace, Jr., member, read as follows:

"The Hearing for E. Lorene Thompson, Vocational Rehabilitation Supervisor, Department of Social Welfare, was resumed at 10:30 A.M. At the conclusion of the hearing, it was the decision of the Board that the action of the appointing authority in dismissing Miss Thompson be sustained. The Personnel Director was directed to place the name of Miss Thompson on the eligible register for Vocational Rehabilitation Counselor for a period of one year."

6. The Secretary of the Civil Service Board directed a letter to the Plaintiff reporting its decision, a copy of which letter is attached to Plaintiff's Petition as Exhibit "24."

7. Other than the minutes referred to in Paragraph 5 above, (including the partial transcript attached thereto) and the letter marked Plaintiff's Exhibit "24", there has never been and is not now any written decision, opinion or recommendation made or filed by the Civil Service Board of the State of Kansas, with respect to Plaintiff's appeal from her dismissal as Supervisor of Vocational Rehabilitation at Topeka State Hospital.

8. At the expiration of the one year that the Board directed that the Plaintiff's name be placed on the register as a Vocational Rehabilitation Counselor, i.e., on April 3, 1970, the Plaintiff directed and delivered to the Director of the Personnel Division of the State of Kansas, a letter requesting that her term of eligibility be extended for a period of one

year in accordance with the provisions of K.S.A. 75-2942 (2) a copy of which letter is marked Exhibit "25I" and attached to Plaintiff's Petition.

9. In response to the request described in the preceding paragraph, the Secretary of the Civil Service Board directed a letter to the Plaintiff under date of April 6, 1970, a copy of which is marked Exhibit "25J" and attached to Plaintiff's Petition.

10. The Plaintiff then filed proceedings before the Civil Service Board of the State of Kansas in the nature of a "Motion for Re-Hearing and Reconsideration", a copy of which "Motion for Re-Hearing and Reconsideration" is marked Exhibit "25" and is attached to Plaintiff's Petition.

11. Plaintiff's counsel mailed a letter of transmittal, together with the original "Motion for Re-Hearing and Reconsideration" to the Secretary of the Civil Service Board, a copy of which letter is marked Exhibit "26" and is attached to Plaintiff's Petition.

12. Plaintiff's counsel mailed copies of the "Motion for Re-Hearing and Reconsideration," together with letters of transmittal to each member of the Civil Service Board and opposing counsel, a copy of which letters of transmittal are marked Exhibits "27" through "30" inclusive, and attached to Plaintiff's Petition.

13. The response and action of the Civil Service Board to Plaintiff's "Motion

for Re-Hearing and Reconsideration" is reported in the minutes of the Civil Service Board for May 11, 1970, and reads as follows:

> "The Board reviewed the request for re-hearing for Lorene Thompson requested by Mary Schowengerdt, attorney for Miss Thompson. It was the decision of the Board that it does not have jurisdiction over the matter."

14. The only information and notice that Plaintiff or her counsel received concerning the handling of the "Motion for Re-Hearing and Reconsideration" by the Civil Service Board are represented by a letter dated April 28, 1970, to Plaintiff's counsel from the Secretary of the Civil Service Board, a copy of which is marked Exhibit "31" and attached to Plaintiff's Petition; and the letter of May 12, 1970, to Plaintiff's counsel from the Secretary to the Civil Service Board, a copy of which is marked Exhibit "32" and attached to Plaintiff's Petition.

On the basis of the undisputed evidence herein the Court makes the following conclusions:

1. The action of the defendant, State Board of Social Welfare, in dismissing the plaintiff from her permanent position as a classified civil service employee without advance written notice specifying the charges against her and without an opportunity to be heard or present her evidence, was a violation of procedural due process as required by the Constitution of the United States.

2. The action of the defendant, State Board of Social Welfare, in dismissing plaintiff from her permanent position as a classified civil service employee was in violation of Kansas Department of Administration Regulations Article 9, and therefore null and void.

3. The action of the defendant, Civil Service Board, in sustaining such dismissal was unconstitutional, illegal, arbitrary and capricious.

4. The actions of the defendants were in violation of the statutes and regulations enacted with respect to the administration of the Civil Service Laws of the State of Kansas.

5. The plaintiff is not barred from equitable relief in this case by reason of laches or waiver.

6. The relief to which the plaintiff is entitled in this action is restoration to her position, payment to her of all salary that has been lost by reason of such dismissal and for her attorney fees and costs.

The Court therefore decides that on the basis of the entire record in this case that the Plaintiff's Motion For Summary Judgment should be sustained and the Plaintiff is entitled to judgment directing and ordering the Civil Service Board to enter an order reinstating the Plaintiff as Supervisor of Vocational Rehabilitation, Topeka State Hospital, and for payment to her of all salary that has been lost by reason of such dismissal and for her attorney fees and costs.

Now on the 15th day of January, 1971, comes on for hearing Defendants' Motion for Re-Hearing, Plaintiff appearing by Mary Schowengerdt and Robert R. Irwin of Irwin, Irwin & Schowengerdt, her attorneys; the State Board of Social Welfare appearing by its attorney, Woody D. Smith; and the Civil Service Board of the State of Kansas and the Department of Administration of the State of Kansas appearing by John R. Martin, their attorney. Thereupon, oral arguments are presented, after which the Court sustained the Defendants' Motion for Re-Hearing and allowed the defendants time to furnish additional evidence.

Thereupon, the defendants filed with the Court a transcript of the hearing before the Civil Service Board, held on March 27, 1969, and April 3, 1969. The defendants stated that they did not wish to offer any evidence additional to that contained in the transcript and submitted the case to the Court on the record before the Court, including the transcripts. Counsel then filed written briefs supplementary to those previously filed and commenting on the evidence contained in the transcript.

Now, on this 18th day of February, the Court enters a Supplemental Memorandum Decision adopting and affirming its Memorandum Decision filed in this case on December 14, 1970, and finds that under the entire record now before the Court, the action of the Defendant State Board of Social Welfare acting through Charles Hamm in dismissing plaintiff from her permanent position as a classified civil employee was in direct violation of Kansas Department Administration Regulations

governing the dismissal of classified civil service employees.

The Court further finds that the act of the defendant, State Board of Social Welfare, acting through Mr. Charles Hamm, its acting director of Vocational Rehabilitation, in summarily dismissing the plaintiff from her permanent position as a classified civil service employee without advance written notice specifying the grounds for dismissal and without affording her an opportunity to be heard prior to dismissal was in violation of procedural due process of law as required by the 14th Amendment to the Constitution of the United States.

The court therefore decides that the plaintiff is entitled to judgment in this case on her petition and is entitled to be reinstated to her position as Vocational Rehabilitation Supervisor. The Court further finds and orders that an additional pretrial conference be had in this matter following the call of the motion docket on Friday, March 12, for the purpose of exploring the remaining issues in this case and the scope of evidence to be presented in support of the parties' positions.

Now, on this 12th day of March, 1971, comes on a pretrial conference in the above entitled matter, the plaintiff appearing by Mary Schowengerdt and Robert R. Irwin of Irwin, Irwin & Schowengerdt, her attorneys; the Department of Social Welfare appearing by its attorney Woody D. Smith, and the Civil Service Board of the State of Kansas and the Department of Administration of the State of Kansas

by Franklin R. Theis, their attorney. Thereupon, the Court finds that the remaining issues in the case relate to mitigation of damages and attorneys fees and that a trial on said issues should be had on the 23rd day of April, 1971, at 1:30 P.M.

Now, on this 23rd day of April, 1971, comes on for hearing plaintiff's motion for determination of damages, the plaintiff appearing by Mary Schowengerdt and Robert R. Irwin of Irwin, Irwin & Schowengerdt, her attorneys; State Department of Social Welfare appearing by its attorney, Woody D. Smith, and Civil Service Board of the State of Kansas and the Department of Administration of the State of Kansas appearing by its attorney, Franklin R. Theis. Thereupon, plaintiff offered her testimony on the issue of attorneys' fees and rested. Thereupon, the defendants offered their testimony on the issue of mitigation of damages and rested. The matter was then taken under advisement on briefs submitted by counsel.

Now, on this 24th day of June, 1971, the Court enters its Memorandum Decision in which it makes the following findings:

1. That the plaintiff is entitled to be reinstated to her position as Vocational Rehabilitation Supervisor with the State Department of Social Welfare for reasons contained in the Memorandum Decisions dated December 14, 1971, and the Supplementary Memorandum Decision, dated February 18, 1971, in which decisions the Court found that plaintiff was denied due process of law, both Constitutional and statutory in the manner in

which she was summarily removed from her permanent position as a classified civil service employee.

2. That the plaintiff is entitled not only to be restored to her position but also to be reimbursed for her full salary which she has lost as a result of her wrongful dismissal, which shall consist of the regular salary which plaintiff was making at the time of her dismissal, plus any regular across-the-board increases which she would have received had she been continued in her position.

3. That plaintiff shall have restored to her her social security and retirement benefits.

4. That the Plaintiff should not be provided any merit increases since this is speculative, and she may or may not have received such merit increases.

5. That plaintiff is not entitled to the accrual of any vacation or sick leave benefits for the period of time from the date of her dismissal, February 17, 1969, to the date of her return to work, July 1, 1971, since she has been on an enforced vacation during this period of time.

6. That the plaintiff is entitled to interest on the salary which she has not received for the period of time from February 17, 1969, to July 1, 1971, at the rate of 6% per annum, which interest is in the amount of $1,561.50.

7. That a date should be set for plaintiff's return to work, and it is the

judgment and order of the Court that plaintiff be restored to her position as of July 1, 1971.

8. That with respect to the issue of mitigation of damages, the burden is on the defendants to plead and prove any mitigation of damages by reason of the fact that plaintiff might with reasonable diligence have obtained suitable employment elsewhere during the period of her enforced absence from work, and the Court finds that on the basis of the record before the Court that the defendants have not sutained the burden of proof and that during the period she has been off work the plaintiff has diligently sought employment in her field. Since the burden of proof on this issue has not been sustained, the Court finds that there should be no deduction from the plaintiff's damages as a result of failure to mitigate damages.

9. The Court concludes that attorneys' fees should not be allowed in this case.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that the Plaintiff be reinstated to her classified civil service position as Vocational Rehabilitation Supervisor at Topeka State Hospital, effective as of July 1, 1971.

IT IS FURTHER BY THE COURT ORDERED that the plaintiff have judgment for damages herein in the amount of the salary which she has lost as a result of her wrongful dismissal which salary figure is in the amount of $23,225.50.

IT IS FURTHER BY THE COURT ORDERED that plaintiff should not be provided any

merit increases for the period of time from February 17, 1969, through June 30, 1971.

IT IS FURTHER BY THE COURT ORDERED that the plaintiff not be credited with any vacation or sick leave for the period of time from February 17, 1969, through June 30, 1971.

IT IS FURTHER BY THE COURT ORDERED that the plaintiff have as further damages judgment for interest on the salary which she has not received at the rate of 6 per cent per annum which interest figured for the period of time from February 17, 1969, through June 30, 1971, is in the amount of $1,561.50; that the total monetary judgment for principal and interest as of June 30, 1971, is in the amount of $24,787.00; that from and after the 1st day of July, 1971, said judgment shall commence to draw interest at the rate of 8 per cent until the same is paid in full.

IT IS FURTHER ORDERED BY THE COURT that attorneys' fees be denied to the plaintiff, that the court costs of this action be assessed to the defendants.

IT IS FURTHER ORDERED BY THE COURT that the above and foregoing judgment shall become final and effective for purposes of post trial proceedings as of the filing of the above and foregoing Order of Summary Judgment with the clerk of this court on this 30th day of June, 1971.

S/David Prager
David Prager
District Judge
Fourth Division

APPROVED:

IRWIN, IRWIN & SCHOWENGERDT
1520 First National Bank Tower
Topeka, Kansas 66603

BY S/ Mary Schowengerdt
Mary Schowengerdt
Attorneys for Plaintiff

S/ Woody D. Smith
WOODY D. SMITH
Attorney for Defendant, State
Board of Social Welfare

S/ Franklin R. Theis
FRANKLIN R. THEIS
Attorney for Defendant, Civil
Service Board of the State of
Kansas, Department of Administration
of the State of Kansas

APPENDIX H

STATE OF KANSAS
DEPARTMENT OF ADMINISTRATION
Personnel Division
801 Harrison St.--Topeka 66612

April 7, 1969

Miss Mary Schowengerdt
Attorney at Law
First National Bank Building
Topeka, Kansas 66603

Dear Miss Schowengerdt:

In the appeal case of Miss Lorene Thompson, Vocational Rehabilitation Supervisor, State Department of Social Welfare which was heard by the Civil Service Board March 27, 1969 and April 3, 1969, it was the decision of the Board that the action of the Acting Director of Vocational Rehabilitation in dismissing Miss Thompson from her position as a Vocational Rehabilitation Supervisor be sustained.

The Board directed the Personnel Director to place the name of Miss Lorene Thompson on the eligible register for Vocational Rehabilitation Counselor for a period of one year.

Very truly yours,

S/W. F. Kuiken
Walter F. Kuiken,
Secretary to the
Civil Service Board

WFK:so
cc: Miss Lorene Thompson

APPENDIX I

STATE OF KANSAS
DEPARTMENT OF ADMINISTRATION
Personnel Division
801 Harrison St.--Topeka 66612

May 12, 1970

Miss Mary Schowengerdt
Attorney at Law
9th Floor, 1st National Bank Bldg.
Topeka, Kansas 66603

Dear Miss Schowengerdt:

Your request for a re-hearing for Lorene Thompson dated April 27, 1970 was reviewed by the Civil Service Board at the May 11, 1970 meeting.

It was the decision of the Board that it does not have jurisdiction over the matter.

Very truly yours,

S/W. F. Kuiken
Walter F. Kuiken,
Secretary to the
Civil Service Board

WFK:so

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1564

LORENE THOMPSON, *Petitioner*,

v.

GEORGE C. AMIS, HENRY J. RIOJAS, THEODORE K. SHARP, as members of the Civil Service Board of Kansas; and GEORGE C. AMIS, HENRY J. RIOJAS, and THEODORE K. SHARP, individually; and WALTER F. KUIKEN, Secretary of the Civil Service Board of Kansas; and WALTER F. KUIKEN, individually; and the DEPARTMENT OF ADMINISTRATION of the State of Kansas; and the STATE BOARD OF SOCIAL WELFARE of the State of Kansas, *Respondents.*

RESPONDENTS' MOTION TO DENY AND ARGUMENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COME NOW the respondents and in response to the petition for a Writ of Certiorari filed herein by petitioner Lorene Thompson, respondents move and pray that the writ be denied for the reason that no constitutional question exists in this matter, but rather, the

sole issue involves a matter of state controlled civil procedure under K.S.A. 60-2101(a).

VERN MILLER
Attorney General
State of Kansas

WOODY D. SMITH
Attorney for the Department
of Social Welfare

FRANKLIN R. THEIS
Chief Attorney
Department of Administration

Attorneys for Respondents

ARGUMENT AND AUTHORITIES

It is respondents contention that the decision of the Kansas Supreme Court (*Thompson vs. Amis, et. al.*, 208 Kan. . . ., . . . P.2d . . . Petition, Appendix A, page 1a, et. seq.) was founded on a matter of procedural jurisdiction, specifically, the jurisdiction of the district courts of the State of Kansas, and did not, as a consequence, as petitioner suggests, generate a question of denial of due process of law under Amendment XIV to the United States Constitution. Support for respondents' contention is aptly stated by the majority opinion entered by the Kansas Supreme Court. Support for petitioners' contention that her right to due process of law was violated by the court's decision would require a finding by this high court that the petitioner, though advised and represented by counsel of her choice throughout, had the right to ignore and neglect a totally adequate and known statutory remedy, wait for a period of over one year, fashion a remedy to suit her desires and strategy, and then, after finding that the court was without jurisdiction of the remedy she fashioned, declare that her own neglect to follow the statutory remedy violated her constitutional rights. The statutory remedy she neglected was provided by K.S.A. 60-2101(a) which insofar as here pertinent provides:

> "A judgment rendered or final order made by a court or any other tribunal, board or officer exercising judicial or quasi-judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court. If no other means for perfecting such an appeal is provided by law, it shall be sufficient

for an aggrieved party to file a notice that he is appealing from such judgment or order with such court, tribunal, board, or officer within thirty (30) days of its entry, and then causing true copies of all pertinent proceedings before such court, tribunal, board or officer to be prepared and filed with the clerk of the district court of the county in which such judgment or order was entered. The clerk shall thereupon docket the same as an action in the district court, which court shall then proceed to review the same, either with or without additional pleadings and evidence, and enter such order or judgment as justice shall require. A deposit as security for costs shall be required by the clerk of the district court as in the filing of an original action. When an action is filed in the district court on appeal or removal from an inferior court the jurisdiction of the district court shall not be limited to only such matters as were within the jurisdiction of the lower court, and the district court may by order permit the issues to be enlarged in the same manner and to the same extent as if the action had been originally commenced in the district court. . . . "

She alleges that the Kansas Supreme Court's construction of this statute was constitutionally defective in that the statute thus (1) precludes an independent judicial review of the law and facts bearing upon the issue of deprivation of a substantial constitutional right; (2) establishes a new "exclusive remedy" rule and applies the same retroactively so as to deprive the petitioner of any judicial remedy to correct the unconstitutional acts of state administrative bodies;

and (3) applies such "exclusive remedy" on its own motion in total contradiction to the clear, committed and unappealed position of the State acting in all its capacities prior to the pending of the matter before the State Supreme Court.

Disposition of petitioner's first allegation can be had by careful reading of the Kansas Supreme Court's opinion in the case, particularly its construction of K.S.A. 60-2101(a). This statute, enacted by the Kansas legislature in the 1963 session, became law January 1, 1964 (See Chapter 303, L. 1963), long before petitioner's dismissal from employment, her subsequent hearings before the State Civil Service Board, and her filing of this action in District Court. Contrary to petitioner's assertion that the Kansas Court's construction "precludes an independent judicial review," not only the statute provides for such review, but the construction of the Civil Service Board's powers as *"quasi-judicial"* by the Kansas Supreme Court establishes in the Board, and thus the reviewing court, the totality of the factual and evidential matters and rulings brought before the Board as well as all the legal issues available to test the validity of the conclusion established. However, like a court of record, with unlimited power to hear, gather facts, and decide, the appealable issues are limited only by the advocates through their presentation of the facts as all the rulings of the court in dealing with these issues of fact and law are subject to review, see *Neely v. Board of Trustees, Policemen's and Firemen's Retirement System*, 205 Kan. 780, 473 P.2d 72, and cases cited therein; *Thompson v. Amis, supra*, Petition, Appendix A, at page 8a.

Additionally, K.S.A. 60-2101(a) allows the reviewing court on appeal to review the case, "with

or without additional pleadings and evidence, and enter such order as justice may require." Thus neither K.S.A. 60-2101(a) nor the Kansas Civil Service Act, i.e., K.S.A. 75-2925 et. seq., mandates a *statutory* limitation on judicial review as is the case in some other statutes providing for judicial review of administrative decisions, e.g. *Strader v. Kansas Public Employees Retirement System*, 206 Kan. 392, 479 P.2d 860, cited by petitioner, yet like *Strader*, the principle that evidence, if at all available, must be produced at the administrative hearing is still sound. Failure to produce evidence, given the vast powers of the advocates to compel it through Board process, can only be attributable to the advocate who ignores this evidenciary opportunity. Additionally the administrative body in *Strader, supra*, did not have plenary power. The Civil Service Board of the State of Kansas *has* plenary power, *Thompson v. Amis*, Petition, Appendix A, at page 11(a); *Gray v. Jenkins, supra.* The decision of the Kansas Supreme Court in *Thompson v. Amis, supra*, merely notes the time limit after which review by the courts may not be requested, following the mandate of the statute.

Secondly, petitioner argues that this is a new, exclusive remedy, applied retroactively in her case. As stated, the statute became law on January 1, 1964. To fall within the purview of this statute, the tribunal, board or officer must exercise judicial or quasi-judicial functions. *Gray v. Jenkins*, 183 Kan. 251, 326 P.2d 319, decided in 1958, and cited in Kansas Statutes Annotated under K.S.A. 75-2949 (1969), the Kansas statute concerning dismissal from the State Civil Service, determined that the Civil Service Board of the State of Kansas exercises *quasi-judicial* functions. In fact, it may have been in remembrance

of this case that the State legislature provided the broader and more orderly remedy of appeal by broadening former G.S. 1949 60-3301 to include review of such "quasi-judicial" decisions rather than just "judicial" decisions in its new code of civil procedure, of which K.S.A. 60-2101(a) is a part. Thus, the decision in *Gray, supra*, and the enactment of K.S.A. 60-2101(a), both preceded by many years the dismissal of petitioner and her appeal to the State Civil Service Board; and both effectively stated the procedural law of Kansas. It follows that the decision of the Kansas Supreme Court did not create nor establish a "new 'exclusive remedy' rule" and that its application was certainly not "retroactive" as alleged by petitioner.

Thirdly, petitioner alleges that the Kansas Supreme Court applied the alleged "exclusive remedy" rule on its own motion and that respondents had consented to a contrary construction of K.S.A. 60-2101(a) before the trial court. For the record, the issue of the exclusiveness of the remedy afforded by K.S.A. 60-2101(a) was raised by respondents in their appeal to the Kansas Supreme Court, *Thompson v. Amis, supra.* Neither counsel nor court may confer subject matter jurisdiction on a court at variance and in derogation of a constitutionally secure statutory mandate of the State legislature as is embodied in K.S.A. 60-2101(a).

CONCLUSION

In conclusion, respondents believe, and we feel this high court recognized long ago by *United States, ex. rel., Arrant V. Lane, Secretary of the Interior*, 249 U.S. 367, 39 Sp. Ct. 293, 63 L. Ed. 650 (1918), that

there are good reasons for the expeditious and orderly settlement of grievances in the matter of public employment, where the court stated in *Lane*, *supra*, at page 372:

> "When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights to the end that if his contentions be justified the government service may be disturbed as little as possible and that two salaries shall not be paid for a single service. . . . "

There is no reason for this court to hear the claim of petitioner that a wholly available, adequate, and constitutionally secure state procedure is now unconstitutional because of her neglect in pursuing it promptly as the statute directed.

Wherefore, your respondents move and pray that the petition for Writ of Certiorari be denied and that the decision of the Honorable Supreme Court of Kansas be affirmed on the basis that no viable federal constitutional question exists for resolution by this great Court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1564

LORENE THOMPSON, Petitioner,

v.

GEORGE C. AMIS, HENRY J. RIOJAS, THEODORE K. SHARP, as members of the Civil Service Board of Kansas; and GEORGE C. AMIS, HENRY J. RIOJAS, and THEODORE K. SHARP, individually; and WALTER F. KUIKEN, Secretary of the Civil Service Board of Kansas; and WALTER F. KUIKEN, individually; and the DEPARTMENT OF ADMINISTRATION of the State of Kansas; and the STATE BOARD OF SOCIAL WELFARE of the State of Kansas, Respondents.

REPLY BRIEF OF PETITIONER

The Respondents, in their Motion to Deny this Petition for Writ of Certiorari, in effect concede there has been here a serious severance of rights of property and liberty in violation of the most fundamental requirements of due process. (See Petition, 12-15) Despite this admission, they argue that no constitutional issue exists of which this Court should take cognizance since Petitioner's right to gain judicial redress from such violation of due process was effectively can-

celled and destroyed by the construction and application placed upon K.S.A. 60-2101(a) by the Kansas Supreme Court nearly three years after the severance of the Constitutional right, and in total contradiction to the clear, committed and unappealed position of the State acting in all its capacities prior to the State Supreme Court's decision. (Petition, 15-22) Such a position, if permitted to prevail in any State of the Union, is so detrimental to the orderly administration of justice and so devastating to many of the most basic and precious rights of all American citizens that Petitioner feels compelled to summarize some of the more serious defects of the Respondent's diversionary arguments.

I. ALL AMERICAN CITIZENS WILL BE VITALLY AFFECTED BY THE OUTCOME OF THIS CASE.

Petitioner is truly a representative American citizen, in a sense we believe this Court rarely has before it, for the purposes of enforcement of crucial Constitutional rights of the vast majority of American citizens. The Constitutional right instantaneously severed in this case was that of the practice of a chosen profession as a civil servant in the field of Vocational Rehabilitation for which the Petitioner is well trained, experienced and qualified. (Petition, pages 49a-50a) In this sense, she represents most directly an amazing number of American citizens, one out of six presently employed by government at some level.[1] In a broader

[1] "Employment and Earnings," Volume 18, No. 11, May 1972, U.S. Department of Labor, Bureau of Labor Statistics.

sense she represents all American citizens as the increasing activity of government both federal and state pervades more and more the lives of all of us, giving rise to astronomical possibilities for abuse for which the Courts must maintain an effective and practically available means for obtaining correction and redress.

II. THE SCALES OF JUSTICE MUST NOT BE PERMITTED TO BE HEAVILY AND UNCONSCIONABLY WEIGHTED AGAINST THE INDIVIDUAL.

In this case the Court has a golden opportunity to demonstrate that it will not permit a State to destroy the citizen's equality in the scales of justice solely on account of its unlimited economic resources to litigate indefinitely against a lone citizen of moderate means.

The pertinent facts of this case are not in dispute. They are well documented and preserved in the RECORD ON APPEAL in the Kansas Supreme Court, a complete copy of which is on file with the Clerk of this Court. These facts are set forth in sequential form in Petitioner's Petition for Writ of Certiorari. (Pages 4-10) Some of the most salient facts were completely disregarded in arriving at the decision to deprive the trial Court of its equitable jurisdiction to grant relief for the unconstitutional dismissal of Petitioner from her classified civil service position. Some of these undisputed facts will be briefly traced to demonstrate that Petitioner was doing exactly what the law required of her. She was acting in good faith and with continuous conscientiousness to resolve the matter of her employment with the State, first administratively (Petition, pages 44a-46a), and when all administrative channels

had been exhausted to resort to the Court in a manner fully compliant with law irrespective of how the Supreme Court of Kansas finally decided to construe and apply K.S.A. 60-2101(a). (Petition, page 7)

First, it is an undisputed fact that on February 17, 1969, the Petitioner was summarily dismissed from her classified civil service position after 11 years of meritorious service. Since this action was taken without any advance notice, specification of grounds or opportunity to be heard, it is of course obvious that she was denied another substantial Constitutional right--the right to counsel. Respondents now attempt to obscure this critical fact by the erroneous statement that Petitioner was "advised and represented by counsel of her choice throughout." True, Petitioner did seek legal representation immediately after her dismissal and has continued henceforth to be represented by counsel. But the whole point is that all the most basic, fundamental due process rights including right to counsel were denied to Petitioner prior to the severance of the Constitutional rights. Thus, in the eyes of the employing agency, Board of Social Welfare, Petitioner became ipso facto only a former civil service employee of the State who could be frozen forever in such a state by ignoring all Petitioner's efforts to become reemployed by the State in some reasonable capacity.

The State agencies' argument that after the cutting off of the Constitutional right, Petitioner was afforded an opportunity to be heard is identical to that raised by New York in defending the policy

of cutting off welfare benefits without a prior hearing. This argument was rejected by this Court in Goldberg vs. Kelly, 397 US 254; 90 S Ct 1011; 25 L Ed 2d 287. Once the entitlement to government funds has been denied by the governmental agency, no matter how arbitrarily or illegally, the individual, whether he be a welfare recipient or a government employee, is placed at an intolerable disadvantage in obtaining remedial action either administratively or judicially.

Even the remedial relief which Petitioner sought immediately after her dismissal by appealing to the Civil Service Board under K.S.A. 75-2949 fell far short of providing many of the basic elements of due process. (See Petition, pages 51a-53a) But despite this glaring example of administrative unfairness to the individual, the Civil Service Board did approve of the action of the Board of Social Welfare in dismissing the Petitioner as supervisor only, but affirmed her right to be reemployed by the State as a Vocational Rehabilitation Counselor. It was so construed and acted upon by Petitioner which position was sustained by the trial court (Petition, page 44a) and insofar as Petitioner knew was accepted by the State agencies inasmuch as they never once during the year gave notice that she was being totally dismissed from state service. In fact the record establishes that she was simply "given the run around," (Petition, page 44a) until the final letter of the Personnel Division establishing for the first time that the State had no intention of rehiring the Petitioner. (RECORD ON APPEAL, pages 27 and 38-40) This action was contrary to the obvious intent of the Civil Service Board ruling of April 3, 1969. For this reason, Petitioner sought rehearing and

review of the administrative disobedience of this ruling, which request was summarily denied. (Petition, page 78a) This final action of the Civil Service Board clearly represented the point of exhaustion of administrative remedies and the final ruling of the "quasi-judicial" tribunal from which the Petitioner did appeal under K.S.A. 60-2101(a) within the designated thirty-day period. (Petition, page 7; RECORD ON APPEAL, page 30-31) This direct appeal action was totally ignored by the Kansas Supreme Court in its ruling that Petitioner had not complied with the "exclusive remedy" requirements of K.S.A. 60-2101(a). The obvious and astounding lesson to be learned from such a ruling is that the Supreme Court of Kansas has for all intents and purposes abolished the salutary principle of Exhaustion of Administrative Remedies. If THOMPSON v. AMIS is allowed to stand, any citizen confronted with an administrative action of <u>any</u> kind at <u>any</u> stage, which at some future time might be construed to be a "quasi-judicial" action, must immediately jump into Court with a direct K.S.A. 60-2101(a) appeal or forever lose his right to seek judicial correction of the administrative error.

III. THE RELIEF GRANTED TO THE PETITIONER BY THE TRIAL COURT FROM A GROSS MISCARRIAGE OF JUSTICE AFTER THIRTEEN MONTHS OF A CAREFULLY AND COMPETENTLY CONDUCTED JUDICIAL DUE PROCESS PROCEEDING MUST NOT BE PERMITTED TO BE CANCELLED BY AN APPELLATE DECISION WHICH DISREGARDS SOME OF THE MOST SALIENT FACTS OF THE CASE, WHICH CONSTRUES A STATE STATUTE UNCONSTITUTIONALLY, AND

WHICH ESTABLISHES A NEW RULE, APPLYING THE SAME RETROACTIVELY ON ITS OWN MOTION IN TOTAL CONTRADICTION TO THE CLEAR, COMMITTED AND UNAPPEALED POSITION OF THE STATE IN ALL ITS CAPACITIES. (Petition, pages 18-22)

The Respondents' only argument in opposition to this point is that, since K.S.A. 60-2101(a) was enacted prior to Petitioner's dismissal it provided a "totally adequate and known statutory remedy." The clear, detailed factual record of this case establishes precisely the opposite. K.S.A. 2101(a) was not even a known, much less an adequate remedy available to this Petitioner. At the time in question, there was absolutely no case law in existence which would provide an inkling that the Supreme Court would interpret K.S.A. 2101(a) in the fashion that it did in this case. (See the Dissenting Opinion of Justice Owsley, Petition, page 12a) It is sheer double-talk for the involved state agencies to contend that the Statute was known or available at all for obtaining judicial correction of illegal rulings of the Civil Service Board at the time of Petitioner's dismissal, February 17, 1969; on the date of the first Civil Service Board ruling, April 3, 1969; on the date of the second Civil Service Board ruling, May 11, 1970; or at any time at all prior to the Supreme Court ruling of January 22, 1972, declaring the statute to be both applicable and exclusive.

See RECORD ON APPEAL, pages 35 and 36 for another case ironically involving the primary state agency here, the Board of Social Welfare, in which the District Court specifically held that the Court lacked jurisdiction to entertain a K.S.A. 2101(a)

appeal from the Civil Service Board. Not only did respondent, Board of Social Welfare, fail to appeal from the ruling in this former case, but as its first line of defense in the K.S.A. 2101(a) appeal filed by Petitioner in this controversy, lodged a Motion to Dismiss, contending that the District Court "has no jurisdiction to hear an appeal from the Civil Service Board of the State of Kansas." (RECORD ON APPEAL, page 36) See further RECORD ON APPEAL, pages 40-53 conclusively establishing that both respondent state agencies committed themselves to the explicit position that the Petitioner's direct appeal under K.S.A. 2101(a) should be dismissed "on the basis that the Court lacks jurisdiction to hear an appeal from the State Civil Service Board under the provisions of K.S.A. 2101(a)." (RECORD ON APPEAL 52-53) This position was adopted by the Court on the basis of such stipulation and journalized in a Court order under date of July 17, 1970, (RECORD ON APPEAL 52-53), which order remains to this day unappealed from by the respondents. Respondents appealed to the Supreme Court of Kansas only from the June 30, 1971, Order of Summary Judgment granting Petitioner judgment on the merits. (RECORD ON APPEAL, page 119) The Record is clear, therefore, that such judgment was overturned by the Supreme Court of Kansas solely on its own motion and in total contradiction to the clear, committed and unappealed position of the State acting in all its capacities prior to the pendency before the Kansas Supreme Court.

This Court has ample authority, and we humbly, but earnestly, urge that it has a Constitutional duty to strike down such duplicity on the part of state government when important United States Constitutional

rights are involved. See the cases of Glus v. Brooklyn Eastern Terminal, 359 US 231; 79 S Ct 760; 3 L Ed 2d 770 and Raley v. Ohio, 360 US 423; 79 S Ct 1257; 3 L Ed 2d 1344, discussed at pages 21 and 22 of the Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons presented as direct rebuttal to Respondents' Motion to Deny, and for all the reasons heretofore set forth in Petitioner's Petition for Writ of Certiorari to the Supreme Court of Kansas filed on May 31, 1972, Petitioner prays that a Writ of Certiorari to the Supreme Court of Kansas be issued by this Court.

Respectfully submitted,

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